Supreme Court, U.S.
FILED

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No. ____________

In The

Supreme Court of the United States

ROBIN SCOTT,

Petitioner,

v.

EUREKA SECURITY, ET AL.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a claim for hostile work environment based on retaliation exist under our current case law?

2. Since a reasonable worker would be dissuaded from filing charges in Scott's shoes since Hendrickson admitted in writing that the reason Scott was being harassed was because she was the only person with a lawsuit against the company, did the trial court err in not allowing, collectively, all acts of retaliation as meeting the "adverse action" element of a retaliation claim pursuant to *Burlington Northern*?

3. Since Scott showed that non-pregnant workers were provided with paid medical leave while she was not, did the trial court err by finding, as a matter of law, that Scott was not discriminated against based on her pregnancy?

4. Since Scott showed that her baby was called the Anti-Christ, she was told she should not have any more babies, and that she was not a good mother, did the trial court err by concluding that Petitioner could not be subjected to a pregnancy hostile work environment by members of her own gender?

5. Since Scott was given only three (3) peremptory challenges while the Defendants were provided six (6), did the trial court abuse its discretion by not leveling the playing field and giving each side four (4) strikes to alleviate the unfairness?

6. Whether the trial court erred by asking the jury to find liability against an entity that was not a party to the suit before allowing the jury to decide whether Defendants discriminated against Scott?

LIST OF THE PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner	Robin Scott
Respondents	Ronald Tully Forest a/k/a Butch Hendrickson

Table of Contents

Question Presented for Review .... i-ii

List of Parties iii

Table of Contents.. iv-v

Table of Authorities.................................... vi-x

Statement of Jurisdiction.................................. 1

Statement of the Case....................................... 1

Argument.. 11

I. There is a split in the circuits as to whether a hostile work environment based on retaliation exists, and therefore, this petition meets the Court's standard of compelling reasons for review on a writ of certiorari.............. 11

II. The courts below refused to acknowledge that a claim for hostile work environment based on retaliation exists............................. 12

III. Petitioner established a *per se* violation of the pregnancy discrimination law since she was the only employee who was denied paid medical leave when she was unable to work, or at the very least, Petitioner raised an issue of fact that only jury could have resolved 13

IV. Scott raised an issue of fact as to whether she was subjected to a hostile work environment because of her pregnancy........................ 17

V. The trial court erred by refusing to grant Scott an equal amount of peremptory strikes as Defendants to alleviate the unfairness 20

VI. The trial court erred as a matter of law in finding that viewing the evidence collectively or in isolation, no reasonable juror could conclude that Petitioner suffered an adverse action.. 23

VII. The trial court erred by requiring Plaintiff to establish liability against a non-party, Eureka, before the jury could decide whether Tully and Hendrickson aided and abetted Eureka in discriminating against Scott 27

VIII. Conclusion... 30

Appendix

TABLE OF AUTHORITIES

CASES

Aman v. Cort Furniture Rental Corp.,
85 F.3d 1074 (3d Cir. 1996) 12

Andrews v. City of Philadelphia
895 F.2d 1469, 1484 (3d Cir. 1990) 27

Barnes v. Hewlett-Packard Co.,
846 F. Supp. 442, 444 (D.Md.1994) 16

Burlington N. & Sante Fe Ry. Co. v. White,
548 U.S. ----, 126 S. Ct. 2405
165 L. Ed. 2d 345 (2006) 24

Clark County School Dist. v. Breeden,
532 U.S. 268, 270 (2001) 23

Cohen v. Temple Physicians Inc.,
11 F. Supp.2d 733, 737 (E.D. Pa. 1998) 28

Commonwealth v. Thorp, Reed & Armstrong,
25 Pa. Commw. 295, 361 A.2d 497,
502 (1976) 25

Davis v. Levy, Angstreich, Finney, Baldante,
20 F. Supp.2d 885, 887 (E.D. Pa. 1998) 29

Desert Palace Inc. v. Costa,
539 U.S. 90, 101 (2003) 29

Edmonson v. Leesville Concrete Co., Inc.,
500 U.S. 614, 623 (1991) 21

EEOC v. Avecia, Inc.,

2005 U.S. App. LEXIS 22157 12

Evans v. Nine West Group, Inc.,
2002 WL 550477, (E.D. Pa. 2002) 18

Faragher v. City of Boca Raton,
524 U.S. 775, 787 (1998) 19

Fedorchick v. Massey-Ferguson,
577 F.2d 856, 858 (3d Cir. 1978) 21,22

Globe Indemnity Co. v. Stringer,
190 F.2d 1017 (5th Cir. 1951) 20,21

Gonzales v. Biovail Corp., Int'l.,
356 F. Supp. 2d 68, 79 (D. P.R. 2005) 16

Gunnell v. Utah Valley State Coll.,
152 F.3d 1253, 1264 (10th Cir 1998) 11

Hampton v. Borough of Tinton Falls Police Department,
98 F.3d 107, 116 (3d Cir. 1996) 25

Harris v. Forklift Systems, Inc.,
510 U.S. 17, 23 (1993) 19

Harris v. Richards manufacturing Co.,
511 F. Supp. 1193, 1203 (W.D. Tenn 1981),
aff'd in part and rev'd in part, 675 F.2d
811 (6th Cir. 1982) 25

Holcomb v. Powell,
433 F.3d 889, 901)D.C.Cir 2006) 24

Int'l Union., United Auto, Aerospace and Agr. Implement Workers v. Johnson Controls, Inc.,
499 U.S. 187, 199 (1991) 14,17

Jensen v. Potter,
435 F.3d 444 (3d Cir. 2006) 11

Kim v. Nash Finch Co.,
123 F.3d 1046, 1060 (8th Cir. 1997) 25

Kirk v. Raymark Industries, Inc.,
61 F.3d 147, 156 (3d Cir. 1995) 20

Knox v. Indiana,
93 F.3d 1327, 1334-35 (7th Cir. 1996) 11

Lujan v. Johanns,
184 Fed. Appx. 735, 738 (10th Cir. 2006) 12

Manning v. Metropolitan Life Ins. Co.,
127 F.3d 686, 692 (8th Cir. 1997) 11

Mattern v. Eastman Kodak Co.,
104 F.3d 702, 707 (5th Cir. 1997) 11

McGreevy v. Stoup,
413 F.3d 359 (3d Cir. 2005) 25

McNulty v. Citadel Broad. Co.,
58 Fed. Approx. 556, 565 (3d Cir. 2003) 27

Morris v. Oldham County Fiscal Court,
201 F.3d 784 (6th Cir. 2000) 11

Newport News Shipbuilding & Dry Dock Co. v. EEOC,
462 U.S. 669, 684 (1983) 17

Noviello v. City of Boston,
398 F.3d 76, 90 (1st Cir. 2005) 11,12

Page v. Connecticut Dept. of Public Safety,
Div of State Police,
185 F.Supp.2d 149, 157 (D.Conn. 2002) …….. 16

Pennsylvania State Police v. Suders,
542 U.S. 129, 137 n.4 (2004) ………………… 12

Raniola v. Bratton,
243 F.3d 610, 617 (2d Cir. 2001) …………….. 12

Ray v. Henderson,
217 F.3d 1234, 1244-5 (9th Cir. 2000) ……….. 11

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 150, (2000) ……………………..... 13

Rhett v. Carnegie Ctr. Assocs.
(In re Carnegie Ctr. Assocs.),
129 F.3d 290, 297 (3d Cir. 1997) …………….. 14

Richardson v. N.Y. State Dep't of Corr. Serv.,
180 F.3d 426, 446)2d Cir. 1999) …………….. 11

Robinson v. City of Pittsburgh,
120 F.3d 1286, 1297 (1997) …………………... 23,25

Sauers v. Salt Lake County,
1 F.3d 1122, 1128 (10th Cir. 1993) …………… 25

Shaner v. Synthes (USA),
204 F.3d 494, 503 n.9 (3d Cir. 2000) ………… 23

Sheffield v. Lewis,
246 Ga. 19, 268 SE2d 615 (1980) …………….. 21

Sigmon v. Parker Chapin Flattau & Klimpl,
901 F.Supp. 667, 677 (S.D.N.Y.1995) 16

Smith v. Borough of Wilkinsburg,
147 F.3d 272, 278 (3d Cir. 1998) 27,28

Tennant v. Peoria & P.U. Ry. Co.,
321 U.S. 29, 35 (1944) 20

Terry v. Ashcroft,
336 F.3d 128, 148-50 (2d Cir. 2003) 12

Trout v. Hidalgo,
517 F.Supp. 873, 890 n.67 (D.D.C. 1981) 25

Von Gunten v. Maryland,
243 F.3d 858, 866 (4th Cir. 2001) 11

Wideman v. Wal-Mart Stores Inc.,
141 F.3d 1453, 1456 (11th Cir. 1998) 11

STATUTES

28 U.S.C. § 1870 20,21
42 USCS § 2000e-3 12,13
42 U.S.C. § 2000e(k) 14

Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit affirming the district court's decision finding as a matter of law that Scott did not state a claim for pregnancy discrimination and Title VII does not provide for a claim of hostile work environment based on retaliation that was entered on August 7, 2005. The jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statement of the Case

Robin Scott, who had worked for Eureka for 10 years, testified that she was denied paid medical benefits when she was unable to work due to pregnancy complications in September 2000. (A-16-18; A-44). During her seventh year of employment, Scott presented a doctor's excuse stating she was unable to work on September 8, 2000 due to pregnancy related reasons. (A-17). Scott testified that at that time she was having false labor contractions, swollen feet, and was throwing up from different smells present in the factory. (A-24-25).

Forest a/k/a "Butch" Hendrickson, Scott's Foreman, admitted that the company provided paid medical benefits to its employees who were unable to work because of a medical condition. (A-77). Ronald Tully, Director of Manufacturing, also admitted that the company provided paid medical benefits if an employee could not work due to medical reasons. In order to be given paid medical leave, an employee only had to provide a doctor's excuse. (A-79). Tully understood that there was a difference between maternity leave and being unable to work because of pregnancy. (A-85).

Hendrickson admitted that Scott brought a doctor's note stating the she was "temporarily unable to work due to chemicals in plant. Needs to stay off her feet". (A-79). Tully admitted that Scott provided medical documentation stating she could not work because of chemicals in plant but yet he did not provide her with paid medical leave. (A-86-87).

After handing the excuse to Hendrickson and Tully, Scott stated that Tully screamed and yelled at her. (A-23). Scott testified that she was not given the same benefits as everyone else who was unable to work. (A-32,33). Tully told Scott that the Pregnancy Discrimination Act (PDA) was no longer in effect. (A-20).

Scott contacted the Equal Employment Opportunity Commission (EEOC) and the EEOC sent Scott paperwork showing that the Pregnancy Discrimination Act was still in effect. (A-20). The trial court refused to allow Scott to show the entire document to the jury, Petitioner's Exhibit 6, which was the material that she was provided by the EEOC that specifically showed that Defendants were violating her rights by not giving her the same benefit as non-pregnant workers who were unable to work. (A-21-22).

Specifically, the Equal Employment Opportunity Commission (EEOC) document, Petitioner's Exhibit 6, told Defendants that "if an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy related conditions. Employees with pregnancy related disabilities must be treated the same as other temporary disabled employees for accrual and crediting of seniority, vacation calculation, pay increase and temporary disability benefits. (A-20-23). In the face of that law, Tully still refused to grant Scott paid medical benefits. (A-20).

Scott gave the Pregnancy Discrimination Act that she received from Equal Employment Opportunity Commission (EEOC) to Hendrickson and Tully. (A-20). Although Tully and Hendrickson had a copy of the pregnancy law in their hand, Tully and Hendrickson refused to even look at the material provided by Scott. (A-20). Hendrickson admitted that Scott provided a document regarding pregnancy discrimination, but yet he refused to read it. (A-77). Hendrickson admitted that he refused to review the documents, which Scott told him would allow her to obtain paid medical leave. (A-77).

Scott turned in another medical excuse dated September 11, 2000. (A-24-25). The doctor's note instructed that Scott not work around the chemicals that were making her sick. (A-24-25). Scott was losing weight at the end of her pregnancy because she was throwing up from the chemicals in the factory. (A-25). At that time, Scott was restricted from lifting no more than 5 lbs. (A-25).

Hendrickson admitted that he received the second doctor's excuse from Scott stating that she cannot work because of the chemicals, and she could only lift no more than five (5) pounds. (A-80-81). Hendrickson admitted that Scott never received paid medical benefits for that excuse. (A-81).

Hendrickson called Scott and told her that the doctor's slip was thrown in the garbage, and it was unacceptable. (A-17). Scott was told that if she did not show up from work on Monday, September 11, 2000, she would be terminated. (A-26). Scott appeared for work on Monday and continued to work thereafter.

However, not surprisingly, Scott got injured at work on September 11, 2000. (A-27). Tully screamed and yelled at Scott, and told her that she was only eligible for FMLA leave and that the PDA was no longer in effect. (A-27). Tully tried to force Scott to sign off on FMLA papers.

Tully screamed at Scott once she told him that she contacted the Equal Employment Opportunity Commission (EEOC). (A-62). After telling Tully that the EEOC said the Pregnancy Discrimination Act was still in effect, Tully exploded. Tully yelled "get her the F out of here now". (A-27). Renee Neff testified that Tully slapped down papers in front of Scott when she was injured and told her she was only entitled to FMLA leave. (A-68-69). Neff also testified that Tully threw up his hands and said get her [Scott] the hell out of here. (A-69).

Scott was limited to sedentary work by the Work Med doctors after beginning treated for the work-related injury on September 11th and prior to the birth of her son. (A-56). Nonetheless, Defendants had work for Scott to perform within that restriction. (A-34).

Scott brought in yet another excuse telling Defendants that she could not work. (A-28). Dr. Davis authored a noted stating that "... Robin has been experiencing back pain and edema of her extremities, and I have recommended being September 11, 2000 that she stop working completely until approximately six weeks after she has delivered . . . ." (A-29).

Hendrickson admitted that Scott brought yet another doctor's excuse stating that she could not work. (A-81). Hendrickson would not accept the excuse and forced Scott to get another excuse that excluded the word "recommend." (A-82). Hendrickson still refused to provide Scott with paid medical leave benefits even after she acquiesced to this request. (A-82). Hendrickson stated that "... I believe I asked her to take the family leave papers". (A-83).

Hendrickson told Scott that Dr. Davis told him that Scott could work and it was their decision whether to have her work. (A-30). Scott testified that Hendrickson was hostile "...face to face, he was bringing up how Eureka had lawyers and attorneys . . ." and how her friend had to intervene in the discussion. (A-30).

Darlene Cortese testified that she accompanied Scott to Eureka because she was afraid for Scott. (A-65). Cortese stated that Hendrickson did not want to take Scott's doctor excuse, and that he was really ignorant. (A-66). Hendrickson was in Scott's face, and she was pregnant and Scott was getting upset. (A-66). Cortese stated that Hendrickson told them that he called the doctor and that Scott could work and that they have a lot of attorneys. (A-66). Hendrickson forced Scott to get another doctor's excuse. (A000401). Cortese testified that she felt that Scott needed a bodyguard to go to the worksite. (A-66). Cortese was even physically shaking herself from the interaction with Hendrickson. (A-66). Hendrickson threatened Scott that she better get back to work. (A-66).

Scott was forced to obtain still yet another doctor's note specifically excluding the word 'recommend.' (A-31). The second note dated September 13, 2000, stated that "... Robin Scott is completely unable to work beginning September 11th, 2000 until six weeks after her delivery. This is an addendum to a letter written earlier today in which I used the phrase, 'I have recommended that this patient stop working on September 11th, 2000.'". (A-32).

Three days after handing in the two September 13, 2000 excuses, Scott had an emergency C-section "... because the baby was in - - they did an emergency C-section because I felt that all the stress I went through all week". (A-33). Scott had major surgery due to the C-section.

Tully admitted that the law would supersede the Collective Bargaining Agreement. The Leave of Absence form actually states that "leave [is granted] for personal illness, *maternity* or injury ..." (A-89-90)(emphasis added).

Scott was released back to work on October 30, 2000. (A-33-34). Defendants refused to allow Scott to return to work at that time because Defendants said that ". . . they needed to get all restrictions off." (A-33-34). At the time, Scott was still under restrictions for her work-related injury, and was not able to lift more than 30 lbs. (A-33-34).

Defendants told her that they did not have light duty work. (A-34). Scott stated that "I asked him, I was on more restrictions when I was pregnant than I was on – I couldn't lift more than five pounds when I was pregnant, and this one say I can't lift more than 30 pounds, and I said that – it doesn't make sense why would have more – you wouldn't have work. I said that's retaliation because I – I was fighting for the pregnancy leave." (A-34).

Scott was not recalled until the end of November 2000 (A-34). Scott was not called back in retaliation for filing charges of discrimination. (A-36). Renee Neff, who was beneath Scott in seniority, testified that she was told by her manager, Cindy, that she was not called back because they did not want Scott back at the work site. (A-69). In order to recall Neff, Scott had to be working. The company did not want to bring Scott back because she was a troublemaker. (A-69). Amanda Rumford testified that the environment for Scott was worse after she filed charges of discrimination. (A-75).

Hendrickson told Scott that she was not allowed back because she was suing the company. (A-36). Hendrickson also told Scott that if she dropped the charges against them that everything would go back to normal. (A-40) Hendrickson admitted that only after she requested paid medical leave that he had a problem with Scott. (A-78). Hendrickson admitted that Scott was a good worker. (A-84).

When Scott was allowed to work she noticed that the video surveillance camera that was in her work area was angled directly at her. (A-36-37). Scott questioned Hendrickson why she was being singled out, and he told Scott that they could do whatever they wanted. (A-37). Another retaliatory act was when Defendants called her back the same day that her workers' compensation hearing was set for, May 18, 2001. (A-38). An even more egregious act was when Defendants forced Scott to bring an excuse from her doctor requesting that she be allowed to take calls from her doctor when her son was ill. (A-41-43). Prior to that, Defendants were refusing to give her calls about her sick son.

Scott's newborn, whom she almost lost because he went into fetal distress, was called the Anti-Christ by her co-workers. (A-59). Scott testified that " . . . why would a woman call a child the anti-Christ child? The child didn't chose (sic) to be born. I'm the one who had the baby. What gave her the right to call my baby the anti-Christ child?" (A-59) Scott's co-workers also stated that they were going to have a witch hunt when she came back to work following the birth of her child. (A-59). Scott's co-workers taunted her by telling her "what are you going to do about it." (A-60).

Amanda Rumford testified that she heard Scott's co-worker call Scott's child the Anti-Christ, that Scott should not be having any more babies, and that she was not a good mother. (A-74). Rumford testified that "[t]here were whispers and there were things that were said lightly enough to where you could hear them, and knew who they were being told. There were times that she went to the - - she got into tears and went to the restroom. There were times that - - that she broke down right there at her desk. She went home sick sometimes. She went into the office a few times to discuss the harassment." (A-74).

Scott stated that she was yelled and screamed by her co-workers, Doreen Barrett and Ruth Nick. (A-39-40). Her co-workers had refused to show her how to do a job, and their foreman had to get involved. (A-40-41). Rumford testified that "... when she got upstairs, Nolan [no one] would train her on a specific job. And it got so bad that Cindy, our boss upstairs, had to come over and yell at a few of the women. It was Linda, Helene and Karen, for not wanting to train her because they didn't like her. Linda made the comment that I'll - - I'll quit or be fired before I train that woman. So Cindy had to come over and ultimately train her because Nolan [no one] - - Nolan [no one] would do it." (A-74).

Rumford stated that "... they would all sit around and whisper and talk, you know, she doesn't know what she's doing, she can't get anything right. And it was loud enough where she could hear it. We could all hear it. And she would get upset, and she would go into - - she would come over and she would be crying. And she went – she'd go to the restroom, and she would be - - she'd come out and say that she got sick or that she wasn't feeling well. And she would just be in tears. She was just an emotional wreck at times." (A-75).

Scott's co-workers would criticize her work, refuse to help her, and Scott went to the Hendrickson for help. (A-41). Hendrickson stated that her co-workers could do whatever they want and he would let them. (A-41). Defendants stood outside their office with their hands crossed staring at Scott. Although Scott asked to see Tully on numerous occasions, Tully refused to see Scott.

The trial court would not allow Scott to testify to the specific instances of harassment. (A-42). The trial court found that the instances of harassment were hearsay. (A-42).

Scott worked very rarely for the rest of 2000 and through the first two quarters of 2001. (A-35-36, 38). Scott was laid off more in 2001 than she had been in the past. (A-38). Scott testified that her co-workers were called back to work when she should have been called according to the seniority list. (A-64).

Scott filed several grievances over her treatment. (A-46-47). "I filed charges with the EEOC. I was being harassed by my foreman, Butch Hendrickson, and by my coworkers who were on a daily basis yelling, screaming at me. I asked Butch to please stop it, just to let me go in there and do my work, but he refused to stop the harassment, and he allowed it to happen, and I don't know why. All I wanted was my pregnancy leave. I didn't want to be harassed. I just wanted to work for a living." (A-49).

"Butch Hendrickson was harassing me, and allowing my coworkers to harass me on a daily basis". (A-50-51). Scott's co-workers told her "that I should not be entitled - - that pregnancy should not be entitled to the same thing as people who have a heart attack. They told me they don't choose to have a heart attack, so why should I be given the same rights under the pregnancy law." (A-59).

The company had a no harassment policy, and according to that policy, employees report to a supervisor to resolve a problem. (A-95). Although Scott asked for help by filing the grievances, neither management nor the union ever interviewed her or sat down with her to discuss what was going on. (A-46-48, 52-53, 57-58).

Defendants never held company wide meeting. Neff testified that neither Tully nor Hendrickson interviewed her in connection with the work environment. (A-71). Neff testified that the company did not like women to work the machinery. (A-71).

Rumford stated that she was never interviewed about Scott's complaints of harassment or retaliation. (A-75). Eileen Kwolek and Nora Carpenter were not interviewed in connection with any complaint of harassment by Hendrickson or Tully.

Although the work area was recorded by video surveillance, Defendants never even reviewed the tapes as Scott requested, which would have shown the harassment. (A-57-58). Ruth Nick admitted that if you look at videotape you could see everything that was occurring in the TC department. Defendants refused to watch the video surveillance cameras. (A-57-58). Hendrickson did nothing to stop the harassment even though he saw and Scott begged him to help her. (A-60-62). Scott was disciplined for leaving her work area to find a manager to stop the harassment. (A-43-44).

The trial court refused to allow Scott to present testimony that Scott was constructively discharged. (A-12). The trial court refused to allow Scott to discuss the events that occurred in 2003. (A-12, 55). However, when Defendants wanted to discuss 2003, the trial court allowed the same. (A-63).

ARGUMENT

I. There is a split in the circuits as to whether a hostile work environment based on retaliation exists, and therefore, this petition meets the Court's standard of compelling reasons for review on a writ of certiorari

Petitioner respectfully requests that this Court accept review of her petition for writ of certiorari to the Third Circuit Court of Appeals. There is a split in the circuits as to whether a claim of hostile work environment based on retaliation exists. *Jensen v. Potter*, 435 F.3d 444 (3d Cir. 2006); *Noviello v. City of Boston*, 398 F.3d 76, 90 (1st Cir. 2005); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Ray v. Henderson*, 217 F.3d 1234, 1244-45 (9th Cir. 2000); Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *Knox v. Indiana*, 93 F.3d 1327, 1334-35 (7th Cir. 1996); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Although the Third Circuit has found a claim exists, the Court nonetheless did not reverse the district court's ruling that no such claim exists.

Additionally, in affirming without issuing an opinion, the Third Circuit has endorsed the trial court's erroneous findings that pregnancy cannot form the basis of a hostile work environment claim when women are the harassers; that the court does not view actions collectively and broadly in connection with finding an adverse action; that it was proper to ask the jury to find against an entity not party to the action before dealing with the parties at hand; and that one side is allowed more peremptory challenges than the other when a party requests equal amount of peremptory challenges.

II. The courts below refused to acknowledge that a claim for hostile work environment based on retaliation exists

Petitioner argued in the lower courts that she was subjected to a hostile work environment based on her opposing and filing charges of discrimination. Nonetheless, the trial court held that no such claim exists under our current law. Consequently, the trial court refused to allow that claim to be submitted to the jury. In doing so, the court ignored the prevailing law in its own circuit and several others.

This Court has cited as an example of being in a protected group, filing a claim of discrimination before resigning. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 n.4 (2004). Further, the Third Circuit has found that complaining of discrimination does place an employee in a protected group. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996); *See also EEOC v. Avecia*, Inc., 2005 U.S. App. LEXIS 22157. Other circuits have also found this same proposition. *See Noviella v. City of Boston*, 398 F.3d 76, 91 (1st Cir. 2005) (holding that evidence of retaliatory harassment was adequate to allow reasonable jury to find that officer was confronted by hostile work environment); *Lujan v. Johanns*, 181 Fed. Appx. 735, 738 (10th Cir. 2006); *Terry v. Ashcroft*, 336 F.3d 128, 148-50 (2d Cir.2003); *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir.2001)

There is no basis why the trial court concluded that no cause of action for hostile work environment can be predicated on allegations of retaliation. The trial court erred by not acknowledging accepted law related to a hostile work environment claim. In fact, a careful look at 42 USCS § 2000e-3 acknowledges that such a claim exists. The statute specifically states an employer cannot engage in "discrimination for making charges, testifying, assisting, or participating in enforcement proceedings." 42 U.S.C.S § 2000e-3.

Because Scott showed she was in a protected class (i.e. reported, opposed discrimination, and filed charges), the trial court erred as a matter of law in holding that she could not pursue a hostile work environment claim premised on filing charges of discrimination and opposing discriminatory conduct. Unfortunately, the Third Circuit did not reverse the trial court's erroneous holding.

III. Petitioner established a *per se* violation of the pregnancy discrimination law since she was the only employee who was denied paid medical leave when she was unable to work, or at the very least, Petitioner raised an issue of fact that only a jury could have resolved

This Court instructed courts in the employment discrimination context when "entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (internal quotations omitted) (emphasis added).

In applying this standard, it is apparent that the Respondent was not entitled to judgment as a matter of law on Petitioner's pregnancy discrimination claim. In this case, it is clear that Petitioner provided evidence that non-pregnant employees were given paid medical leave when unable to work, and she was denied paid medical leave when unable to work because of her pregnancy. This Court has explicitly held that the Pregnancy Discrimination Act (PDA) requires employers not to discriminate on the basis of pregnancy. *Int'l Union, United Auto., Aerospace and Agr. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

The Act specifically provides that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k). The Third Circuit has also resoundingly held that an employer must "treat a pregnant woman in the same fashion as any other temporarily disable employee" according to the Pregnancy Discrimination Act (PDA) and the Pennsylvania Human Relations Act (PHRA). *Rhett v. Carnegie Ctr. Assocs. (In re Carnegie Ctr. Assocs.)*, 129 F.3d 290, 297 (3d Cir. 1997).

In this case, it is clear that Petitioner not only proved her prima facie case of discrimination based on her pregnancy, but also introduced additional evidence of Defendants' policy of providing paid medical leave of employees who were unable to work. Defendant provided paid medical leave to employees who were unable to work. (A-77,79). Nonetheless, in Petitioner's case Defendants refused to provide benefits to Petitioner solely because she was pregnant. (A-76-77, 86).

The testimony showed that Forest a/k/a "Butch" Hendrickson, Scott's Foreman, admitted that the company provided paid medical benefits to its employees who were unable to work because of a medical condition. (A-77). Furthermore, in order to be given a paid medical leave of absence an employee had to only bring in a doctor's excuse. (A-79). Petitioner complied with this procedure and was still denied the same. Specifically, Defendants admitted that Petitioner brought in a doctor's note stating that Petitioner was "temporarily unable to work due to chemicals in plant. Needs to say off her feet." (A79, 81-82).

Defendants admitted that Petitioner was never provided with paid medical leave, in spite of her complying with the procedure of bringing a doctor's note. (A-81). Instead the evidence indicates that Defendants demanded Petitioner show up for work or else be terminated. (A-66). Consequently, the trial court should have rendered a judgment in Petitioner's favor since Defendants' actions *per se* violated the Pennsylvania Human Relations Act by refusing to give Scott the same benefits as other employees who were unable to work, rather than granting Defendants' motion for judgment as a matter of law.

The trial court also mistakenly assumed that Petitioner applied for maternity leave which somehow made Petitioner ineligible for paid medical leave that the company offered. (A-116-117). Even if the judge mistakenly drew that conclusion, the evidence implored the court to draw the opposite conclusion. Defendants conceded that Petitioner requested paid medical leave for her pregnancy and they refused to provide the same. (A-77).

However, assuming arguendo that Petitioner applied for maternity leave, that still does not take her out of the protected class. The Equal Employment Opportunity Commission (EEOC) has found that "Maternity and Pregnancy Leave" is covered "[i]f an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disable employee; for example, by providing modified tasks, alternative assignments, disability leave or without pay." http://ww.eeoc.gov/facts/fs-preg.html. (emphasis added).

Further other courts have held that a characterization of maternity or pregnancy leave still places the Petitioner in the protected class. *Gonzalez v. Biovail Corp., Int'l.* 356 F. Supp. 2d 68, 79 (D. P.R. 2005) (holding "where the employee is pregnant or on maternity leave at the time the adverse employment action occurs, her status as a member of the protected class is evident . . ."); *See also Sigmon v. Parker Chapin Flattau & Klimpl,* 901 F.Supp. 667, 677 (S.D.N.Y.1995); *Barnes v. Hewlett-Packard Co.,* 846 F.Supp. 442, 444 (D.Md.1994); *Page v. Connecticut Dept. of Public Safety, Div. of State Police,* 185 F.Supp.2d 149, 157 (D.Conn. 2002).

Therefore, calling the leave maternity did not take Scott from the protection of the PHRA because the focal points are (1) whether Petitioner was unable to work due to her pregnant, and (2) whether Defendants gave sick and accident benefits/disability benefits to employees who were not pregnant.

Furthermore, the trial court believed that by having a doctor's excuse that required Petitioner to be off six (6) weeks to recover after giving birth made her ineligible for paid medical believe. However, this evidence actually underscores Petitioner's assertion that she was discriminated on the basis of her pregnancy, because Defendants' had knowledge that she had pregnancy related medical conditions.

Also, Petitioner provided evidence that showed non-pregnant workers received time off for similar into the future leave. (A-86-93, A-106-107). Therefore, the trial court erred by deciding in favor of Defendants when clearly Defendants treated Petitioner differently than non-pregnant workers unable to work because of a medical condition.

Here, Petitioner proved that she provided Defendants with several medical documents stating that she was unable to work due to her pregnancy and Defendants granted leave to non-pregnant employees freely and effortlessly. (A-86-93, A-106-107). The evidence showed that Defendants refused to treat Petitioner the same as non-pregnant workers. At the very least, the trial court should have allowed this issue to go to the jury. Consequently, the Third Circuit, in affirming the trial court's ruling, erred in allowing Defendants to escape liability when they discriminated against Petitioner because of her pregnancy.

IV. Scott raised an issue of fact as to whether she was subjected to a hostile work environment because of her pregnancy

The trial court mistakenly and erroneously relied on Petitioner's status as a woman rather than her status as a pregnant person for Petitioner's hostile work environment claim. (A-109-111, 118-119). The trial court should have focused its analysis on the fact that Petitioner's co-workers were hostile towards Petitioner on account of her pregnancy.

Although it is true that this Court has held "for purposes of Title VII, discrimination 'on the basis of sex' includes discrimination because of or on the basis of pregnancy, childbirth, or related medical conditions. The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (internal quotations omitted); *See also Int'l Union, United Auto., Aerospace and Agr. Implement Workers*, 499 U.S. 187 (1991).

This does not mean that a pregnant woman cannot be subjected to a hostile work environment by women merely because women subjected the pregnant woman to the hostile work environment. This is what the trial court and the Third Circuit by affirming their decision allowed, when it held that because Scott's co-workers were women and largely the offenders of maintaining and advancing a hostile work environment that proved fatal to her claim. In fact, Petitioner's gender had no bearing on her hostile work environment claims because she contended that she was treated hostile not because she was a woman, but because she was *pregnant*.

Instead of adhering to the current standard of review that the evidence must be viewed in the evidence most favorable to Scott [the non-movant], the trial court and the Third Circuit Court of Appeals by affirming, ignored the current law by holding that Petitioner was not part of the protected group. Plaintiff has demonstrated a prima facie case of hostile work environment based on pregnancy. Further, courts have found that a woman can harbor a hostile work environment to a pregnant woman. *See Evans v. Nine West Group, Inc.*, 2002 WL 550477, (E.D. Pa. 2002).

The evidence showed that Petitioner was repeatedly harassed before and after giving birth. The trial court should have allowed a jury to decide whether Petitioner was harassed by her co-workers and bosses because of her pregnancy when her co-workers called her newborn the Anti-Christ, made comments about her not choosing to be pregnant, told her she should not have any more babies, and told her she was a horrible mother. Her supervisor went so far as to refuse to acknowledge the law associated with a pregnant woman's rights, refusing to accept her medical documentation telling Defendants she was unable to work.

Additionally, Defendants unduly harassed petitioner by requiring her to obtain additional doctor's excuse after she had submitted at least three (3) excuses stating she could not work, yelling and screaming at her, and threatening termination if she did not show up for work knowing her medical condition. All of these precipitated Petitioner's pregnancy, causing her child to go into fetal distress because of all the stress. (A-19-21, 23, 25, 26-28, 32-33, 59, 62, 65-66, 68-69, 77, 79, 80-81).

Courts have allowed similar claims to proceed on a hostile work environment claim. In order to establish a case of hostile work environment, plaintiff must show that the workplace is both "objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). This Court has held that courts must consider the totality of the circumstances when determining whether a hostile work environment exists, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

In the case at hand, Petitioner was subjected to discriminatory conduct on an almost daily basis, with remarks from her supervisor and her co-workers about her pregnancy and her unfitness as a mother after giving birth to her baby. The Petitioner provided evidence that she was humiliated by these actions. Amanda Rumford testified that Petitioner went home in tears sometimes, "there were times that –that she broke down right there at her desk. She wet home sick sometimes. She went into the office a few times to discuss the harassment." (A-74).

Angling a camera directly in Petitioner's line of view after she had filed a claim of discrimination with EEOC, surely caused plaintiff some anguish. Rumford testified on several occasions when Petitioner needed help her co-workers would refuse her, which caused her to go to the bathroom and come out saying she was not feeling well. (A-74-75). "And she would just be in tears. She was just an emotional wreck at times." *Id.* These combined events are significant and pervasive enough to constitute a hostile work environment.

It is without a doubt that the trial court erred by discrediting Petitioner Scott's evidence because she presented more than a "scintilla" of evidence. Consequently, the jury should have been allowed to decide whether she was harassed because of her pregnancy. "It is the jury, not the court which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusion that which it considers most reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29. 35 (1944).

V. The trial court erred by refusing to grant Scott an equal amount of peremptory strikes as Defendants to alleviate the unfairness

The trial court refused Scott's request to have both sides get an equal amount of peremptory challenges (i.e. four) since she was faced with two (2) Defendants, Tully and Hendrickson, and instead gave Defendants three (3) more strikes than her. (A-144-148). In civil cases, each party shall be entitled to three (3) peremptory challenges. *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 156 (3d Cir.1995)(citing 28 U.S.C. § 1870); *See also Globe Indemnity Co. v. Stringer*, 190 F.2d 1017 (5th Cir. 1951).

"In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them." 28 U.S.C. § 1870; *See also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 623 (1991). However, "[w]hen a single party faces several parties with interests adverse to him, the trial judge *may expand the number of peremptory challenges available to **both sides**.*" *Fedorchick v. Massey-Ferguson*, 577 F.2d 856, 858 (3d Cir. 1978) (emphasis added). "While this gives the court discretion when applying it, this is not an arbitrary or unreasonable discretion, but a judicial discretional reviewable where the record discloses improper or unreasonable exercise. The denial of such request for additional peremptory challenges upon the sole ground that the law forbade would in our judgment be an improper exercise of that discretion, or more accurately, a failure or refusal to exercise it. ...." *Globe Indemnity Co. v. Stringer*, 190 F.2d 1017 (5th Cir. 1951).

In *Fedorchick,* the Court affirmed the trial court's granting of six (6) peremptory challenges to both sides. *Fedorchick v. Massey-Ferguson*, 577 F.2d 856 (3d Cir. 1978). In that case, the plaintiff was faced with three defendants. *Id.* Astutely, the trial court recognized the unfairness in giving each party three peremptory challenges (i.e. plaintiff 3 vs. defendants 9). *Id.* Consequently, the trial court gave each side six (6) peremptory challenges to alleviate the unfairness to the plaintiff when obviously the defendants could have picked a jury of their liking since they had three times the challenges as plaintiff.

In *Sheffield*, the Court reversed the lower court granting each defendant three (3) peremptory strikes, a total of six (6) for the defendants, while only giving the plaintiff three (3). *Sheffield v. Lewis*, 246 Ga. 19, 268 SE2d 615 (1980). The Court reasoned:

> [a] different situation arises when multiple parties to a suit receive more strikes than their adversary. ***The party receiving fewer strikes cannot cure the imbalance and error caused thereby exercising either all of his strikes or none of them. His adversaries will clearly have an advantage. They will have the power to select a jury presumably balanced in their favor*** by challenging a greater number of jurors, regardless of whether the opposite party uses all of his strikes or not.

Id. (emphasis added).

Identically, here, Scott was disadvantaged from the start since the trial court stacked the deck against her by allowing Defendants three (3) more peremptory challenges than she received. Just a cursory review of the docket, shows that Defendants did not have different defenses or theories, but rather 'identical' and 'joint' defenses.

For example, Defendants continually filed "joint" motions (e.g. Joint Motion for Reconsideration, Trial Brief on behalf of both Defendants), and called "joint" witnesses. In fact, Defendants' filed all pre-trial and trial documents either 'joint' or on behalf of both. (A000013-20). Not one pre-trial or trial document was filed separately by Tully and Hendrickson. (See Third Circuit Appendix, A000013-20).

Consequently, there was absolutely no reason to give Defendants the opportunity to select a jury in their favor by giving them three (3) more strikes than Scott. The trial court abused its discretion when it summarily denied Scott's request to even the playing field by providing each side with four (4) peremptory challenges.

The trial court should have done what the court in *Fedorchick* did, and provided each side with the same number of challenges to alleviate the unfairness of giving one side more challenges than the other.

VI. The trial court erred as a matter of law in finding that viewing the evidence collectively or in isolation, no reasonable juror could conclude that Petitioner suffered an adverse action

The Petitioner in the instant case suffered an adverse employment action when she was denied paid medical leave, received a written reprimand accompanied with a threat of termination after her employer knew she was pregnant, suffered continued harassment by her co-workers and her supervisor, denied workers' compensation benefits, called back to work on the date of her workers' compensation hearing, harassed by placing a camera directly on Petitioner, and being constructively discharge. However, the trial court refused to allow Petitioner to present her arguments related to the fighting of her workers' compensation claim, receiving discipline, the issue of the camera being placed directly in front of her, her constructive discharge, or the collective treatment of Petitioner as adverse actions for the claim of retaliation. (A-129). The trial court would not allow the fact that the harassment escalated as a form of retaliation. (A-121).

In contrast, this Court has held that "workplace conduct is not measured in isolation." *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) *per curiam*. Moreover, the Third Circuit has instructed that "courts should not analyze the employer's individual acts in isolation, but rather should examine the acts collectively in deciding whether there has been adverse employment action." *Shaner v. Synthes (USA)*, 204 F.3d 494, 503 n.9 (3d Cir. 2000). Additionally, to be adversely affected "does not mean that the employee must be threatened with or experience 'economic' or 'tangible' discrimination." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (1997) (emphasis added).

This Court recently addressed the types of actions that constitute adverse employment action under the anti-retaliation provision of Title VII. *Burlington N. & Sante Fe Ry. Co. v. White*[1], 548 U.S.----, 126 S. Ct. 2405, 2412-2415 (2006) (holding an employer can retaliate against an employer with harmful actions outside the workplace, retaliation includes but is not limited to a schedule change to a mother with school-age children and excluding an employee from a lunch that contributes to professional development).

Several circuits have held viewing workplace actions collectively can render an adverse employment action. *Holcomb v. Powell*, 433 F.3d 889, 901 (D.C.Cir. 2006). In *Holcomb*, the D.C. Circuit overturned a lower court decision that found against the plaintiffs retaliation claim. The court correctly viewed the evidence collectively rather than in isolation to find that the plaintiff repeatedly engaged in protected activity by filing a claim with the EEOC and trading correspondence with her superiors.

In the instant case, Petitioner also had complained to the EEOC, and tried to show her employer that pregnancy discrimination law exists, yet the trial court still found that a reasonable juror could not conclude that Petitioner suffered an adverse employment action. Here, plaintiff not only did similar actions as the plaintiff in *Holcomb*, but also plaintiff was harassed and called back to work on the date of a workers' compensation hearing. In effect Petitioner's employer was forcing her between a choice of going to her job or attending the hearing.

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[1] The Court found a broad interpretation of what constitutes an "adverse employment action." *Burlington*, 126 S. Ct. at 2412-2413.

A supervisor's threats, even if not carried out, establishes an adverse action. *Robinson*, 120 F.3d at 1297. The Third Circuit has noted that formal reprimands that result in notation in an employee's personnel file may be sufficient to establish an adverse action. *Id.* at 1298. Moreover, "receiving or being denied a desired promotion is sufficiently serious and tangible to constitute a change in the employee's 'terms, conditions, or privileges' of employment." *Id.* at 1299; *See Hampton v. Borough of Tinton Falls Police Department*, 98 F.3d 107, 116 (3d Cir. 1996) (holding that an undesirable assignment imposed can constitute an adverse action); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)(finding that a transfer against the employee's wishes may constitute an adverse employment action).

Moreover, the court noted that many courts have found adverse action without the reduction of pay. *Id. See Trout v. Hidalgo*, 517 F. Supp. 873, 890 n.67 (D.D.C. 1981) (finding an adverse action when an employer moved an employee's office to an undesirable location); *Harris v. Richards Manufacturing Co.*, 511 F. Supp. 1193, 1203 (W.D. Tenn. 1981), *aff'd in part and rev'd in part*, 675 F.2d 811 (6th Cir. 1982) (holding that transferring an employee to an isolated area was an adverse action); *Commonwealth v. Thorp, Reed & Armstrong*, 25 Pa. Commw. 295, 361 A.2d 497, 502 (1976) (finding adverse action when employee was restricted in using firm stationary and told to move personal files); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (holding that "[w]hat happened to Kim was much more disruptive than a mere inconvenience or an alteration of job responsibilities [or] changes in duties or working conditions that caused materially significant disadvantage"); *McGreevy v. Stroup*, 413 F.3d 359 (3d Cir. 2005)(holding "[a] reasonable jury could find that the 40 rating given to

McGreevy by the principal and adopted by the Superintendent was in retaliation for the exercise of her First Amendment rights. If the jury so found, the [defendant] would be subject to liability.").

Here, Scott suffered more than mere inconvenience by Tully and Hendrickson when they: (1) denied her paid medical leave, which she was entitled to the same; (2) continually refused to accept medical documentation stating that Scott was unable to work; (3) forced Scott to get more medical documentation; (4) threw the medical excuses in the garbage; (5) threatened that if she did not report for work she would be terminated even though she had medical documentation informing Defendants that she could not work; (6) yelled and screamed at Scott for getting hurt on the job when she was in her ninth month of pregnancy; (7) tried to force Scott to sign off on FMLA forms for absence; (8) refused to even look at the law concerning pregnancy discrimination that was provided to Defendants; (9) told Scott that the Pregnancy Discrimination Act was no longer in effect; (10) failed to allow her to come back to work under the guise that they did not have light duty, yet prior to her leave, Defendants forced Scott to work with more restrictions; (11) aimed the video surveillance camera directly on her; (12) allowed her co-workers to harass her; (13) recalled her for work the day she was to appear at a workers' compensation hearing; (14) told Scott that if she dropped the charges everything would go back to normal; (15) threaten that they have a lot of attorneys when Scott requested paid medical leave; (16) reprimanded with a written warning that threatened Scott's employment when Scott left her work area to get help to stop the harassment; and (17) specifically told Scott and memorialized in a memo that the reason she was being treated the way she was because she was the only one suing the company; and (18) constructively discharged.[2]

Although in isolation most of the aforementioned acts constitute an 'adverse action'[3], at the very least, the trial court should have allowed the jury to consider Defendants' actions collectively. Therefore, the trial court erred by not allowing the jury to resolve the issue of facts as whether all actions viewed collectively established that Scott was retaliated against for filing charges of discrimination.

VII. The trial court erred by requiring Plaintiff to establish liability against a non-party, Eureka, before the jury could decide whether Tully and Hendrickson aided and abetted Eureka in discriminating against Scott

Jury instructions must properly apprise the jury of the law. *McNulty v. Citadel Broad. Co.*, 58 Fed. Appx. 556, 565 (3d Cir. 2003). "[I]t is inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth." *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998).

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[2] The trial court specifically ruled that he would not allow the jury to consider or hear any evidence of what happened to Scott in 2003, which was in error since the jury should have been allowed to hear how Scott's employment ended after enduring three (3) years of harassment. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) (holding "[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.").

[3] Scott requested that a jury resolve each adverse action separately as well collectively.

In *McNulty*, the Third Circuit vacated judgment and remanded the case. *Id.* In that case, the trial court provided the instruction of whether plaintiff's age was a "motivating or determinative" cause of defendant's actions. *Id.* at 565. The court held that the instruction given by the trial court was not harmless, and should have been limited to "determinative". *Id.* The court stated "[i]n the field of employment discrimination, courts have struggled for decades to develop and refine an evidentiary framework that fairly balances the interests of the employee who challenges her employer's conduct ..." *Smith* 147 F.3d at 278.

Here, the trial court required Scott to establish liability against non-party, Eureka,[4] before dealing with the claim at hand (i.e. aiding and abetting under the Pennsylvania Human Relations Act against Tully and Hendrickson). (A-129-131). However, there is no caselaw that supports such a proposition, and clearly that confused the jury in that they needed to find against a non-party that was never present in Court before getting to the case against Tully and Hendrickson. (A000026, 1035). In essence, the jury had to find against a party that was not a Defendant before being allowed to assess the claims that Tully and Hendrickson were charged with. Instead, the trial court should have limited its instructions and jury slip to Tully and Hendrickson and aiding and abetting.

Moreover, the case law that does exist regarding the PHRA's establishment of liability is contrary to the trial court's holding. A trial court has held that individual employees can be found liable if "a supervisory employee can be shown to have aided and abetted the employer's discriminatory actions in violation of the PHRA." *Cohen v. Temple Physicians Inc.*, 11 F. Supp.2d 733, 737 (E.D. Pa. 1998). Further, under the PHRA a supervisor can be held liable under an aiding and abetting/accomplice liability theory . . . for his own direct acts of discrimination or for his failure to take action to prevent further discrimination by an employee under supervision." *Davis v. Levy, Angstreich, Finney, Baldante*, 20 F. Supp.2d 885, 887 (E.D. Pa. 1998).

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[4] The trial court granted Scott's request that the claims of Tully and Hendrickson be severed from Eureka. (Third Circuit Appendix 000010; Doc. No. 101).

According to the above stated case law it would seem counter-intuitive to require as a predicate to Petitioner's claim to prove liability against the corporation rather than the individual supervisors. In the instant case, the trial court failed to give accord to prevailing law in the circuit as to proving liability. Consequently, the decision of the lower court should be overturned.

Furthermore, the trial court provided a pretext instruction when it should have provided a mixed motives instruction since Scott had produced testimony as well as evidence in the form of an admission by Hendrickson that she was treated the way she was because she was the only worker with a lawsuit against the company. (A-36; Third Circuit Appendix A000158, 1062). This Court has held plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Desert Palace Inc., v. Costa*, 539 U.S. 90, 101 (2003) (internal quotations omitted). Clearly, Petitioner has not only provided sufficient evidence but direct evidence that she was treated differently than other workers.

VIII. Conclusion

For all the foregoing reasons, Petitioner requests that this Court grant this Petition and direct the Third Circuit to vacate the judgment in favor of Tully and Hendrickson, and direct a verdict in Petitioner's favor, or alternatively, remand this case for a new trial.

Respectfully submitted,

s/ Cynthia L. Pollick
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Counsel for Petitioner

APPENDIX

Table of Contents

1. Court of Appeals for the Third Circuit Order denying Petition for Rehearing dated November 14, 2006………………………… A-1

2. Court of Appeals for the Third Circuit Order dated September 26, 2006 ……..……………... A-3

3. Judgment in Defendants favor..……………….. A-5

4. Jury Verdict Slip……………………………. A-6

5. Excerpts of Trial Testimony………………….A-12

6. Brief in Support of Plaintiff's Motion for Four Peremptory Strikes Per Side………………… A-138

7. Memorandum & Order denying Plaintiff's Motion for Four Peremptory Strikes Per Side……………………………………... A-144

8. Argument in Support of Instruction on Adverse Actions…………... A-149

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3809

ROBIN SCOTT,
Appellant

v.

EUREKA SECURITY PRINTING COMPANY, INC.;
RONALD TULLY, Individually and as a Supervisor
of Eureka Security Printing Co., Inc.;
BUTCH HENDRICKSON, Individually and as a
Supervisor of Eureka Security Printing Co., Inc.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA
D.C. Civil No. 02-cv-00805
District Judge: The Honorable John E. Jones, III

Present: SCIRICA, Chief Judge, SLOVITER, McKEE,
RENDELL, BARRY, AMBRO, FUENTES, SMITH,
FISHER, and CHAGARES, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: November 14, 2006
CMD/cc: Cynthia L. Pollick, Esq.
Sal Cognetti Jr., Esq.
Timothy P. Polishan, Esq.
David J. Solfanelli, Esq.

UNITED STATES COURT OF APPEALS
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No. 05-3809

ROBIN SCOTT,
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v.

EUREKA SECURITY PRINTING COMPANY, INC.;
RONALD TULLY, Individually and as a Supervisor
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BUTCH HENDRICKSON, Individually and as a
Supervisor of Eureka Security Printing Co., Inc.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Civil No. 02-cv-00805
District Judge: The Honorable John E. Jones, III

Argued: September 11, 2006

Before: SCIRICA, Chief Judge, SLOVITER and BARRY,
Circuit Judges

JUDGEMENT ORDER

This case came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on September 11, 2006. After careful consideration of the briefs, the record, and the arguments of counsel on appeal,

It is hereby ORDERED that the August 9, 2005 Judgment of the District Court is affirmed. Each party is to bear its own costs.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: **September 26, 2006**

Certified as a true copy and issued in lieu
of a formal mandate on November 22, 2006

Teste:

Clerk, United States Court of Appeals
for the Third Circuit.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

ROBIN SCOTT V. RONALD TULLY and BUTCH HENDRICKSON	Case Number: 02cv805

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Verdict in favor of the Defendants and against the Plaintiff.

Approved By: s/ John E. Jones III
John E. Jones III
United States District Judge

8-9-05
Date

Mary D'Andrea
Clerk
s/ Elizabeth A. O'Donnell
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBIN SCOTT, :
:
Plaintiff, : No. 3:CV-02-805
:
v. :(Judge Jones)
:
RONALD TULLY AND :
BUTCH HENDRICKSON, :
:
Defendants. :

JURY SIGNATURE FORM

William E. Strayer	s/ William E. Strayer	(Date)	8/9/05
Samuel L. Bierly	s/ Samuel L. Bierly	(Date)	8/9/05
MichelleLeeCashdollar	s/MichelleLeeCashdollar	(Date)	8/9/05
Lori A. Raunch	s/ Lori A. Rauch	(Date)	8/9/05
Rose A. Andreas	s/ Rose A. Andreas	(Date)	8/9/05
Harry S. Trump	s/ Harry S. Trump	(Date)	8-9-05
Wayne A. McGinness	s/ Wayne A. McGinness	(Date)	8-9-05
Sally M. Knapp	s/ Sally M. Knapp	(Date)	8-9-05
Graham B. Laughner	s/ Graham B. Laughner	(Date)	8/9/05

John E. Macgill, Sr. s/ John E. MacGill (Date) 8/9/05

Cynthia L. Kreger s/ Cynthia L. Kreger (Date) 8/9/05

Donald E. Hammond s/ Donald E. Hammond (Date)8/9/05

1. Do you find by a preponderance of the evidence that Eureka retaliated against Plaintiff Robin Scott for filing complaints of discrimination in the following ways: (1) in the handling of involuntary layoffs, voluntary layoffs and call backs and/or (2) by failing to interview Plaintiff for the jet press position?

Yes _____

No X____

FOREPERSON: s/ Sally M. Knapp

INSTRUCTIONS: If you answered NO, please return to the courtroom. If you answered YES, proceed to Question #2.

2. Do you find by a preponderance of the evidence that Defendant Ronald Tully aided or abetted Eureka in either or both of the acts of retaliation stated in Question #1?

YES _____

NO _____

FOREPERSON: ______________________

INSTRUCTIONS: Proceed to Question #3.

3. Do you find by a preponderance of the evidence that Defendant Butch Hendrickson aided or abetted Eureka in either or both of the acts of retaliation stated in Question #1?

YES _____

NO _____

FOREPERSON: ______________________________

INSTRUCTIONS: If you answered NO to Questions #2 and #3, please return to the courtroom.

If you answered YES to Questions #2 and NO to Question #3, proceed to Question #4.

If you answered YES to Questions #2 and #3 proceed to Question #4.

If you answered NO to Question #2 and YES to Question #3, proceed to Question #5.

4. Please state the total amount of damages you award to Plaintiff Robin Scott for her retaliation cause of action with respect to Defendant Ronald Tully.

$______________

FOREPERSON: ____________________

INSTRUCTIONS: If you answered NO to Question #3, please return to the courtroom.

Otherwise, proceed to Question #5.

5. Please state the total amount of damages you award Plaintiff Robin Scott for her retaliation cause of action with respect to Defendant Butch Hendrickson.

$_______________

FOREPERSON: ____________________

INSTRUCTIONS: Please return to the courtroom.

53

MR. COGNETTI: Yes, Your Honor, constructive discharge.

THE COURT: All right. I think you may have a problem with constructive discharge as it relates because that's outside the ambit of what you submitted prior to this filing.

MS. POLLICK: Well, Your Honor, I would suggest that the – that is out grown from the retaliation aspect, and it's only one of the elements as a retaliation, as an adverse action.

THE COURT: Well I understand that. You're claiming that she had an adverse employment action against her, which is that – in this particular case she's out of work and you're asking for back and front pay. So within your first two renderings, that's a given, and you can request that relief, it appears to me.

But constructive discharge based on other grounds as set forth in the third complaint, I think that's out of bounds. It doesn't mean that you can't say that she suffered an adverse employment circumstance as it relates to the first two, but I think inasmuch as that was filed midstream after you had filed your federal cause of action, to the extent that that's something new, a new, a fourth, if you will, cause of action for the constructive discharge, you can't go there.

88

A Ruth Nick, Helene McGinnis, Linda Littman, Nora Carpenter, Eileen Kwolek, Amanda Rumford, Renee Neff, Robin Kutchmanich, Bob – my foreman was Butch Hendrickson, Bob Hendrickson.

Q How much did you make a year?

A About 23,000.

Q How was your job performance?

A Great.

Q How long had you been working for Eureka before you filed pregnancy discrimination charges?

A Seven years.

Q Now, during those seven years that you worked for Eureka, had you ever been disciplined?

A No.

Q Did you receive your raises on – your annual raises during those seven years?

A Yes.

Q When do you first believe you were discriminated against because of your pregnancy?

A When I brought the first doctor's slip in on September – September 8th of 2000.

Q Why did you believe you were discriminated against because you were pregnant?

A Because they refused to give me the same medical benefits as everyone else was entitled to, that was the paid accident and sickness benefits that the company offered.

(Pause)

MS. POLLICK: So no objection?

MR. COGNETTI: No objection.

MR. POLISHAN: No objection.

MS. POLLICK: Your Honor, may I approach?

THE COURT: The witness, yes.

MR. COGNETTI: Your Honor, may we move that easel directly next to the witness so we are not facing the back of it?

THE COURT: I guess we have a couple choices given the way this courtroom is configured. We can do it that way. The jury has to see it, and I don't know how you do that and have her see it at the same time.

MS. POLLICK: She has a book, they have a book, everybody has a book so we should all see it, and I put it here so that they can all see it since there is 12 of them.

THE COURT: I have no problem, we've done this in other cases in this courtroom, Mr. Cognetti, if you wanted to walk over, to the extent that she's pointing to it, but you – 3339

MR. COGNETTI: That's all I want, Your Honor, if she points to something I want to make sure I'm following.

THE COURT: Well, you can roam about freely and watch her do that. I think that's the best way to do that

under the circumstances.

Go ahead.

MS. POLLICK: Sorry, Your Honor. This is the same exhibit that is placed here on the monitor.

THE COURT: What number exhibit is this, because I can't see it?

MS. POLLICK: Plaintiff's exhibit 2.

BY MS. POLLICK:

Q Robin, I'm going to show you what's been marked as plaintiff's exhibit 2. Have you ever seen that document before?

A Yes.

Q Can you tell the jury what it is?

A It's a doctor's slip stating that I will not be able to work because of the – because my feet were swelling and because of the chemicals in the plant that were causing me to get sick.

Q Now, does Eureka Security Printing have chemicals in their plant in connection with the dyes they use for the travelers checks and the lottery tickets?

A Yes.

Q Now, can you tell the jury who you provided this excuse to?

A I gave it to – I went up to Eureka Security Printing with my daughter who was three years old at the time, that was Jacquelyn. We went into the office, and Beverly the secretary was there, so she ended up getting my foreman Butch.

Butch Hendrickson came out, looked at the doctor – looked at the doctor's slip and said he had to go back and he had to get Ron Tully. Ron Tully cam back out into the office. I handed him the slip, to Ron Tully, and he looked at the slip, and just started screaming saying, What in the hell are you trying to pull. And he said, The only thing that you're going to be entitled to is the FMLA papers. He went into the office and grabbed the FMLA papers and tried to get me to sign them. I refused to sign them, and as I refused to sign them he got angrier and angrier, started yelling at me, screaming at me in front of my three year old daughter. I started to cry. My daughter was sitting there not knowing what was going on, why mommy's crying.

When I refused to sign the papers, I just started hyperventilating and crying, so – and then I refused to sign the papers, and me and my daughter left the office.

Q Now, how far along were you at that point?

A Thirty-eight weeks.

Q Now, what was your understanding of whether you were entitled to paid medical benefits for leave associated with pregnancy-related complications?

A I never thought I was going to be denied my paid

92

accident and sickness benefits because people in the past has gotten it, so it was a shocker to me when –

MR. COGNETTI: Objection, Your Honor.

THE COURT: Go ahead. Wait.

MR. COGNETTI: Hearsay, Your Honor.

THE COURT: Does it go to the last statement?

MR. COGNETTI: Yes, sir.

THE COURT: That is the statement that other people got them in the past?

MR. COGNETTI: Yes, sir.

THE COURT: What is your –

MS. POLLICK: I have – withdraw that section of her answer that she was saying from her – and I believe she has personal knowledge.

THE COURT: Well, and that may or may not be admissible. The last statement by the witness, to the extent that other people got the same benefits, will be disregarded by you. The objection is sustained to the extent that that statement is stricken and it will not be considered by you. You may proceed.

THE WITNESS: I asked for the paperwork in August of 2000 in the beginning, and I was informed by Ron Tully that the Pregnancy Discrimination Act was no longer in effect. It was a shock to me because I thought it was still there, so what I did is I went home and I contacted the EEOC

and I asked them is the Pregnancy Discrimination Act in effect and they told me yes.

MR. COGNETTI: Objection.

THE WITNESS: They also –

THE COURT: Wait, wait, ma'am. Ma'am, when you hear an objection, you stop your answer.

MR. COGNETTI: Objection.

MR. POLISHAN: Objection hearsay, what the EEOC said.

THE COURT: Do you want to respond to that, Ms. Pollick?

MS. POLLICK: Your Honor, I have no problem with that being stricken from the record.

THE COURT: She didn't complete her answer so the objection is sustained. Go on.

BY MS. POLLICK:

Q Now Robin, let me just back up a little bit. Who in August of 2000 did you tell that you were pregnant and you wanted paid medical leave?

A Butch Hendrickson. And then when I wrote the slip he gave it to Ron Tully, and Ron Tully told me that I was not entitled to them benefits.

Q Now, did you ever request the paperwork for the paid medical leave papers in August.

A I just wanted to have – I thought I was entitled

MR. COGNETTI: Your Honor, it's plural, she used the term defendants.

THE COURT: Try to separate – we've got two separate defendants. I think you should try to differentiate in your question because obviously there are causes of action asserted against each defendant.

BY MS. POLLICK:

Q Okay. What happened once you turned this slip in to Butch Hendrickson?

A Butch came back and handed me the slip back.

Q And what did he say?

A And Ron Tully came in right behind him afterwards saying that there was no – that pregnancy was not considered a disability, that I would have to be on the FMLA act.

Q Now, back to Plaintiff's exhibit 2. What – what was done with this excuse once you turned it in?

A That was the September 11th by Dr. Thomas?

Q Yes.

A Butch called me and told me that the slip was thrown in the garbage, that it was unacceptable. And before – before that, when I left the office, I went home, and I was hyperventilating, so my sister took me down to the CMC Hospital, and they monitored me and the baby on the fetal monitor to make sure that we were okay. Dr. Tomassoni couldn't believe that they wouldn't accept that doctor's slip.

MR. COGNETTI: Your Honor, objection.

THE COURT: Sustained. Anything that was referred to in terms of what the doctor thought or said is not to be considered by you and should be stricken.

BY MS. POLLICK:

Q Now, what did you do once you found out that – when Butch – when they told you that the Ron – excuse me, that the Pregnancy Discrimination Act was no longer in effect, what did you do?

A I contacted the EEOC, and they sent me out paperwork showing that it was still in effect.

Q I'm going to show you what's been marked at plaintiff's exhibit 6. Have you ever seen that document before?

A Yes.

Q And what is this document?

A Facts about pregnancy discrimination.

Q How did you receive it?

A I contacted the EEOC and so they mailed it to me.

Q And when approximately did you receive it?

A The end of August of 2000.

MS. POLLICK: I would like to publish plaintiff's exhibit 6.

interpreting the Federal Register. I'll instruct the jury on the law.

MS. POLLICK: Okay. Well, can I at least use the summary page, and I don't have a problem –

MR. COGNETTI: I have the same objection with the summary page, You Honor. You're asking – they want something to go out to the jury that is incident – potentially inconsistent with your instructions. You are the instructor as to the law.

THE COURT: I'll reserve the judgment whether it goes out to the jury. It won't be published to the jury at this time, but you can certainly refer to what her misunderstanding is and that she got a document from the EEOC, and what her understanding of the Act was based on that.

I think the line of questioning implies that you're going to further establish that based on what she received from the EEOC that the Pregnancy Discrimination Act was still in effect, and I think that can clearly be established without further reference or publication of the document, I don't think that's necessary. I don't think that's an issue.

MS. POLLICK: Well, I believe it is an issue, that she presented this information to the defendants, which puts them on knowledge that this was still in effect and that law was there, and I – she should be – I should be able to

show my jury what she actually gave them that they refused to –

THE COURT: It's not your jury, it's my jury.

MS. POLLICK: Well, that's right, concede there.

THE COURT: You'll follow my ruling, and we'll make a determination later as to the – whether it can be published to the jury, we'll reserve that, and the documents can be referred to, but not published at this time.

MS. POLLICK: When will we be taking it back up?

THE COURT: When I say.

(Whereupon, the discussion held at sidebar between the court and counsel was concluded.)

BY MS. POLLICK:

Q What was the document that you received from the EEOC; what was your understanding after you read it?

A That I was entitled to the same benefits as somebody who has a heart attack or who becomes disabled, that pregnancy is under the same – the same guidelines as people who have heart attacks.

Q Now, what did you do once you received this document?

A I hand – I went in to work, and I handed it to Butch Hendrickson, and then he went out and he gave it to Ron Tully.

MR. COGNETTI: I object, Your Honor. Hearsay unless she could establish she saw it, or some basis.

THE COURT: All right. If you can tie that up, I'll give you the opportunity to tie it up. We'll defer ruling on that if you can tie that up, Ms. Pollick.

BY MS. POLLICK:

Q Now, did you see what Butch Hendrickson did with this document?

A He went – he went out of the department, and he came back, and he said that Ron refused to look at it.

Q And what did you do in response?

A I asked him to look at it, and he refused.

Q And what did you expect that this document would do?

A I thought it would have showed that I was entitled to the same benefits as any other person in the plant.

Q Now, did this document, did it confirm your belief that the Pregnancy Discrimination Act still was in effect?

A Yes.

Q Now, now if you could –

MS. POLLICK: Your Honor, I want to ask you this before I actually ask her. Is it okay if I ask her to read a portion of it?

MR. COGNETTI: We object, Your Honor.

MR. POLISHAN: Objection.

THE COURT: I'm going to rule at this time that P-6, the facts about pregnancy discrimination, that can be published. The Federal Register that follows it will not be published to the jury under any circumstances. You can proceed. Unless the objection is that it's an inaccurate summary of the law, and I don't think that's –

MR. COGNETTI: We believe it's an incomplete summary of the law.

THE COURT: I understand that.

MR. COGNETTI: And therefore inaccurate because of the doctrine of completion, Your Honor.

THE COURT: Well, I understand that, and I'll give you the opportunity to clarify that in whatever way you choose and to point that out, but at this point I'm going to allow it to be published. Go ahead.

BY MS. POLLICK:

Q Okay. Ms. Scott, could you tell under fringe benefits -- did I give you a copy of it?

If you could read to the jury the second sentence.

A "In all – in all – an all-female workplace (sic) or job classification, benefits must be provided for the pregnancy related conditions if benefits are provided for other medical conditions."

Q And then the second sentence thereafter.

A "If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy related conditions. Employees with pregnancy related disabilities must be treated the same as other temporary disabled employees for accrual and crediting or seniority, vacation calculation, pay increases and temporary disability benefits."

Q Now, were you seeking – the sick and accident benefits that you were seeking from Eureka, was that the dis – was that constituted disability benefits?

A Yes.

Q Now, when you provided plaintiff's exhibit 2, which I'll bring up again, what were you medically experiencing at that point?

A Which –

MR. COGNETTI: May we have a date when this was presented?

THE WITNESS: Which one was that one, Dr. Thomas?

MS. POLLICK: Yes. Do you have a copy?

MR. COGNETTI: I'll object unless there's a framework as to a time period, Your Honor.

MS. POLLICK: You already allowed it before.

THE COURT: Well, he's not objecting to the exhibit, the exhibit has already been published. The objection, as I understand it, is the date on which you were asking her if she was experiencing – whether she was experiencing difficulties. What date?

THE WITNESS: It was September 8th I handed the slip in to Ron Tully and Butch Hendrickson.

THE COURT: And the sense of the objection is, I think, that your question related to that date. I assume it does, Ms. Pollick, is that correct, what she was experiencing on that date?

MS. POLLICK: Yes, correct.

THE COURT: All right, you may proceed.

THE WITNESS: I was experiencing my feet were swollen, I was having false labor contractions, I was having morning sickness again. The smells of anything made me nauseous, I was throwing up.

BY MS. POLLICK:

Q Now, after the defendants responded, and you already told the jury about how you were hyperventilating –

MR. COGNETTI: Your Honor, I'm going to object because a foundation hasn't been laid that she gave that to Mr. Tully.

THE COURT: Yeah, the objection is sustained to the extent that the question implied that the defendants responded to – I'm not sure what they responded to. You'll have to rephrase.

BY MS. POLLICK:

Q Who did you present this doctor's note to?

A I gave it to Butch Hendrickson, and he brought Ron

Tully into the office where I handed Ron Tully the slip to him again, because he said I had to give it to Ron.

Q Okay. And what was Butch Hendrickson's response?

A Butch Hendrickson didn't say nothing on this note when Ron Tully came in. When Ron Tully came in he started screaming and yelling at me, What in the hell are you trying to pull. And it was all in front of my three year old daughter, he was yelling and screaming at me, trying to make me sign papers that I believed I wasn't entitled to them – I wanted the same benefits as everyone else were entitled to.

Q What is your understanding of the Family Medical Leave Act that Ron Tully was trying to force you to sign off on?

A That was for if you wanted to take care of you baby. This was because I was unable to work. I became sick, and he refused to give me the same benefits as everybody else was entitled to, so I was fighting for the same benefits – for the same rights as the EEOC said I was entitled to under the Pregnancy Discrimination Act.

Q Now, what happened after you left Eureka that day?

A I was – hyperventilating and crying, so I dropped my three year old off at my grandmother's, and my sister was there and she ended up taking me down to the CMC Hospital. They put me on a machine, they said that I needed to calm down, and they gave me another doctor's slip.

Q I'm going to show you what's been marked as plaintiff's exhibit 3. Have you ever seen that document before?

A Yes.

Q What is it?

A It's a doctor's slip stating that I can't – I can't work – that – it's a light duty slip stating that I can't lift no more that five pounds, and that I can't be around the chemicals that make me get sick.

Q When did you receive this note?

A The day I went in after talking to Ron Tully about the doctor – when he refused – he was refusing to take that doctor's slip in.

Q Okay. And who did you give that note to?

A This note?

Q Yes, plaintiff's exhibit 3.

A I gave it to Butch Hendrickson, and he told me that there was no light duty work and that I needed to go sit at my desk until Ron Tully arrived in.

Q Now, the note says – well ...

MS. POLLICK: Your Honor, I would like to publish it to the jury.

THE COURT: Any objection?

MR. COGNETTI: No, sir, Your Honor.

MR. POLISHAN: No.

THE COURT: All right.

BY MS. POLLICK:

Q Now if you could read this, the first sentence.

A "Patient cannot work secondary to the chemicals present."

Q And it continues on I believe.

A "The factory which makes the patient feel sick. She also cannot lift, pull or push anything over five pounds."

Q Now, can you tell the jury what you were experiencing in connection with the chemicals that were present and how they were affecting you?

A My feet were swollen, I was having false labor contractions, I was – I thought I was going to be having the baby soon, I was just – I was in labor, and I was being forced to work.

Q Now, describe for the how the chemicals made you feel.

A The chem – the chemicals had a smell. It was just like morning sickness all over again that, it got me sick that where I had to go and use the restroom to – basically I was throwing up because – and I was losing weight at the end of my pregnancy because I was becoming sick.

Q Now, what happened when you turned this excuse in?

A When I handed this excuse to Butch, I had to wait

110

with that excuse?

A I was told either I sign the FMLA papers or if I didn't return to work on Monday, September 11th, I would be terminated from my position.

Q How did that make you feel?

A Upset, crying, not wanting – wondering why this is happening to me because I could not understand. I'm about ready to have a baby, and they just made me feel real bad.

Q Now, did you ask your coworkers to help lift the boxes?

A Yes, and they told me if I couldn't do my job I shouldn't be here.

MR. COGNETTI: Objection.

THE COURT: All right. That is – there is – that is an objectionable reference. What her coworkers said to her, other than Mr. Tully and MR. Hendrickson, will be disregarded to the extent that any statement was made about that. That is out of bounds and will be stricken and disregarded. You may proceed.

BY MS. POLLICK:

Q Now, When Butch told you that there was no light duty, what did Ron Tully tell you once he arrived?

MR. COGNETTI: Your Honor. I apologize for interrupting you, but I am assuming this is September 8th. What day are we talking about?

112

BY MS. POLLICK:

Q What day did you turn the note in that's been marked as plaintiff's exhibit 3?

A On the 11th of September.

Q Okay. And what did Ron Tully tell you when he arrived that day?

A That morning?

Q Yes.

A He told me that the girls would do the work.

Q Now, what happened to you while you were working on September 11th, 2000?

A I ended up injuring myself, and pulling a muscle in my back, so I went over and my foreman was in the plant – in the – right next to me, so I went over and told him I pulled something, and he told me that he can't make a decision until Ron Tully comes back, that he's the one who has to make the decision whether or not – where he's going to send me, so he told me to go over and sit at my desk until Ron Tully arrives.

Q And what timeframe is this again?

A September 11th.

Q And the timeframe in the sense of the day?

A About 11 – 12:30.

Q Now, what did Ron Tully do when he arrived back from his lunch?

113

A He arrived – he arrived in the TC department and he started yelling and screaming, What in the hell are you trying to pull now. And just started yelling and screaming at me, came over and put his one hand on the back of my one chair, put his hand on the desk, and put the FMLA papers on the desk, and he said this is the only thing you are entitled to, and the Pregnancy Discrimination Act was no longer in effect.

And when I told him I contacted the EEOC, and they told me it was still in effect, he blew up. He exploded. He said, "Get her the F out of here now." And then the next thing I know the ambulance was arriving to get me out.

Q And what do you recall happened when the ambulance crew arrived?

A I was hyperventilating and crying because I just got done being yelled and screamed at that I got hurt on purpose.

Q Now, what happened the next day to you?

A I went into work, and I asked Butch if I could see their work doctor, and he got me an appointment, and I saw their Dr. Cronin at three o'clock that day.

Q Now, did the ambulance – where did they take you? I left that part out.

A They took me to CMC, and they monitored me and the baby.

could leave. And before going home I went and I saw Dr. Cronin, and he told me – that's when he put me into physical therapy.

Q Now, after seeing him on that day, is there – did you –

A He told me to contact Dr. Davis, and I contacted Dr. Davis and that's when Dr. Davis stated –

Q Don't tell us what Dr. Davis stated.

A I'm sorry.

Q That's okay. When you contacted Dr. Davis, as a result of contacting him, what did you tell him or their office, what did you tell them?

A They told me that –

Q Not what they told you, you can't say that, but what you –

A I told them that I hurt my back, and he told me he –

THE COURT: You cannot say what someone told you. We're going to keep getting objections. And that's not what Ms. Pollick asked you, so let's not get into that area.

Proceed, Ms. Pollick.

BY MS. POLLICK:

Q When did Dr. Davis write a note stating that you could no longer work?

A On the 11th of September.

Q When did you pick that not?
A On the 13th
Q I am going to show you what's been marked as plaintiff's exhibit 4. Have you ever seen this document before?
A Yes.
Q What is it?
A. It's the doctor's slip from Dr. Davis saying that I cannot work no more.
Q And when does it say that – when does it say that he recommends that you no longer work?
A September 11th, 2000.
Q Who did you give this excuse to?
A Butch Hendrickson.
MS. POLLICK: I would like to publish it to the jury.
MR. COGNETTI: No objection, Your Honor.
THE COURT: All right,
BY MS. POLLICK:
Q: Could you read the doctor's excuse to the jury, please?
A: "Mrs. Robin Scott, 432 Boulevard Avenue, Dickson City, PA, is a patient under my care for pregnancy. The estimated date of her delivery is September – 25 September 2000. Robin has been experiencing back pain and

edema of her extremities, and I have recommended beginning September 11th, 2000 that she stop working completely until approximately six weeks after she has delivered. Should you require further information, please contact my office."
And it says. Dr. Davis.
Q When you turned the doctor's note in to Butch Hendrickson what happened?

A He – he went out and he came back in and he told me and Darlene that Dr. Davis said that I can work, that because they had "recommend" in there, that it was up to their – it was their choice if they wanted me to work or not work; so I was shocked.

Q Now, you said "Darlene," who was Darlene?

A A friend.

Q And what was her last name?

A Cortese.

Q And why was she with you on that day?

A So I wouldn't be harassed when I was handing in the slip.

Q Now, after Butch stated that you could work, how did that make you feel?

A Uncomfort – I was uncomfortable, I couldn't believe that Dr. Davis just told me – just made me pick up this slip for him to say that – I didn't know what to think. I thought that Butch was telling me the truth, that Dr. Davis did say that because why would he make something up like that.

Q How was Butch's appearance at that time when you had the interaction?

A It was hostile. He was like face to face, he was bringing up how Eureka had lawyers and attorneys and how much time I took off for my daughter. And my girlfriend was there just to say well, wait a second, stop, and she made me sit down and tried to make it as easy as possible for me.

Q And how far along were you at this point?

A I was still 38 weeks.

Q Now, what did you do next after turning in this excuse?

A When he told me Dr. Davis told him that I can work, I went home and I called Dr. Davis' office.

Q And what did you tell him? Not what they told you, but what did you tell them?

A What I told Dr. Davis' office?

Q Um-hum.

A That they told – that Butch Hendrickson told me that they talked to Dr. Davis, and he said because it had "recommend" in there, that I was able to work. And she – I guess I can't say that.

Q What did you do as a result of talking with Dr. Davis' office?

A She prescribed another note for me to take "recommend" out.

Q Did you get any impression that based on your conversation with Dr. Davis' staff, that you could work?

A Dr. Davis' staff told me I –

THE COURT: Now wait, now wait, wait. I didn't hear your objection.

MR. COGNETTI: Object, hearsay, Your Honor.

MS. POLLICK: I'm not asking – I'm getting her impression of the conversation, I'm not asking her to tell me what they said.

THE COURT: Well, it's going to elicit that, so the objection, based on what I heard thus far, that's clearly what's going to happen, so the objection at this point is sustained. Proceed.

BY MS. POLLICK:

Q What did you do after talking with Dr. Davis' office?

A They told me to come back down and they had another doctor slip for me that was going to rephrase that so I was not able to work.

Q Now, I'm going to show you what's been marked as plaintiff's exhibit 5. Have you ever seen that document before?

A Yes.

Q And when did you get this document?

A On September 13th, 2000.

Q And what was you understanding of this doctor's note?

A It was telling the company that I was unable to work.

Q Now, who did you hand this doctor's excuse to?

A Butch Hendrickson.

Q Who were you with?

A My husband, Wayne Scott.

Q Now, what happened when you went back with another doctor's excuse asking to be off work? What happened?

A Nothing, they did nothing in front of my husband. They just – they just took the excuse and nothing was said.

MS. POLLICK: I would like to publish plaintiff's exhibit 5.

MR. COGNETTI: No objection, Your Honor.

THE COURT: You may do so.

BY MS. POLLICK:

Q Can you read for the jury the doctor note that you received.

A "To whom it may concern. Robin Scott is completely unable to work beginning September 11th, 2000 until six weeks after her delivery. This is an addendum to a letter written earlier today in which I used the phrase, 'I have

recommended that this patient stop working on September 11th, 2000.' Please amend this – please amend that to read she is unable to work."

Q So on the same day, September 13th, you had to get two excuses?

A Yes.

Q And the first excuse was not accepted.

A Correct.

Q By the company, correct?

A Yes.

Q And the second one changed whatever – there was a problem with the first one.

A September 14th when I went up to hand it in with my husband they took it, but nothing was said.

Q Did they ever provide you with paid medical leave?

A For my pregnancy?

Q Yes.

A No.

Q Now, when did you have your baby?

A September 17th, 2000.

Q Was the baby, the date for -- what was the date of estimated delivery?

A September 25th, 2000.

Q Why did you have the baby earlier? What was the situation occurring?

A They had to do an emergency C-section because the baby was in – they did an emergency C-section because I felt that all the stress I went through all week.

Q Now, when were you released back to work?

A I was released back October 30th, 2000.

Q I'm going to show you what's been marked as plaintiff's exhibit 8. Have you ever seen that document before?

A Yes.

Q What is the document?

A It's a doctor's slip returning me back to work off my pregnancy, after me having the birth of my child and recovering.

Q Now, when did Dr. Davis return you to work without restrictions in connection with your pregnancy?

A October 30th, 2000.

Q What did you do with this doctor's excuse?

A I went up and handed it to Butch Hendrickson. And he got Ron Tully and came out and said that they needed to get all restrictions off.

Q And what was your understanding of what they were meaning?

A They wanted – because I was on restrictions for a work related issues, so they wanted me to go to Work Med and get them restrictions off.

A I dropped off the excuse, and they – Beverly, the secretary ended up bringing – calling both Ron and Butch out into the office, but Ron and Butch was there. I handed the slip to Butch, but Ron was standing right there, so Butch had the slip first and then he handed it over to Ron.

Q Okay. And what happened, what was the reaction to this slip?

A Ron Tully's response was that they do not have light duty work. And I asked him, I was on more restrictions when I was pregnant than I was on – I couldn't lift more than five pounds when I was pregnant, and this one says I can't lift more than 30 pounds, and I said that – it doesn't make sense why you would have more – you wouldn't have work. I said that's retaliation because I – I was fighting for the pregnancy leave.

Q And what was his response?

A That they had no light duty.

Q Now, when was the next time you heard from either Butch Hendrickson or Ron Tully?

A It was the last week of November I was recalled back to work.

Q I'm going to show you what's been marked as plaintiff's exhibit 9. Have you ever seen that document?

A Yes.
Q And what is this document?

125

A It's a letter stating as of November 9th, that I would be laid off dues to lack of work they said.
Q And when did you receive this letter, do you recall?
A I don't know when I received it.
Q Was it in and around November 10th?
A Yes.
Q Now –
MS. POLLICK: I'm going to ask to publish this letter, plaintiff's exhibit 9.
MR. COGNETTI: No objection, You Honor.
THE COURT: You may do so.
BY MS. POLLICK:
Q Could you read for the jury what plaintiff's exhibit 9 states?
A "This letter will serve as notice indicating you may return to work under the circumstances spelled out by Work Med following your examination on November 9th, 2000. However, because of your decrease workload in your department, you will be on a layoff status effective November 13th, 2000."
Q Now, after receiving that letter, you had stated that they called you back the end of November.
A The last week of November.
Q And how often did you work?

126

A Just that one week. The last week of November, into the – it ended up that the first – that Friday fell into December, and that was it, I was lady off the rest of that year.

Q Now, when was the first time you ever exercised your rights under the Pregnancy Discrimination Act or Pennsylvania State Human Relations Act?

A It was in November 2000.

Q When was the first time you exercised your rights, according to those Acts?

A When I asked for the accident and sickness paid benefits.

Q Okay, when was that?

A In September of 2000.

Q When did you file formal charges of pregnancy discrimination?

A That was in November of 2000.

Q Who did you file charges with?

A The EEOC.

Q Why did you file charges of discrimination?

A Because I was being discriminated against by Butch Hendrickson and Ron Tully for not having the same benefits as everyone else does with my pregnancy, and then they retaliated by laying me off.

Q Now, why were you not working for the month and –

for the month and a half – not – from management?

A Butch Hendrickson.

Q Okay, why was he claiming you couldn't work during that period?

A Because he told me I was suing the company.

Q Now, when you returned to work, was there anything different at your work station?

A They angled the camera directly down at me.

Q How do you know it was aimed at you?

A Because it was – my work station was here, and the camera was like right there, and it was aimed directly on me, plus Jerry Boudash, the security guard –

MR. COGNETTI: Objection, unless Mr. Boudash is going to testify, Your Honor, and ever if he is, it's hearsay.

THE COURT: Are you about to say something that Mr. Boudash said?

THE WITNESS: No, I saw him angling the camera, and he was holding his CB talking to the security guards saying, do you got a good angle at her.

THE COURT: Now you did say what he said.

THE WITNESS: Sorry.

THE COURT: That will be stricken, what Mr. Boudash said will be disregarded by the jury.

Proceed Ms. Pollick. The objection is sustained

to that extent.

BY MS. POLLICK:

Q Now, besides actually seeing Jerry maneuver the camera, what else did you see that confirmed to you that the camera was angled at you.

A I saw on the security shack that my desk was completely on camera.

Q What did you do about that?

A I went to Butch Hendrickson and asked him why I'm being singled out, and he told me that they could do whatever they want to do.

Q Now, after November you worked you said for that one week. When was the next time you were called back?

A I believe it was in February 2001.

Q What – what did the company tell you at that point?

A That Butch made a comment when he called me back, Long time no see, or long time no hear. He – it was – I think it was a joke, but it was like a smart comment.

Q Now –

A A long time no hear and long time no see.

Q How long did you work that time?

A A week, I think.

Q And when was the next time that you were called back?

A A week in March.

Q And then how about the next time?

A Maybe two days in April, two to three days in April.

Q Had you ever been on a layoff that sporadically?

A Not since I – I boosted up in seniority, so I was never laid off that much because I was number three.

Q Now, in 2000, were you laid off the same amount that you were in 2001?

A No.

Q Were you laid off more in 2001?

A Yes.

Q Now, when did the company call you back the time after that?

A The time after April?

Q Yes.

A The day of my worker's comp hearing in May. I believe it was May 18th, 2001.

Q Now, when did you file a worker's compensation claim?

A I think in 2000.

Q Okay. Now, what were – what were you seeking in the worker's compensation petition?

A For them to pay the medical benefits to my back and receive the benefits for the week that I was off work that day Butch Hendrickson notified me that I would be laid off that day, so as soon as I went in, he told me I was laid off as of the next day.

Q Okay. Now, when you went to the worker – worker compensation hearing, who was present in the courtroom?

A Ruth Nick and Doreen Barrett.

Q And what did you do after the proceeding was over?

A I went back to work and they were bragging about how –

MR. COGNETTI: Objection , Your Honor.

THE COURT: Sustained.

BY MS. POLLICK:

Q Who was – did Doreen Barrett and Ruth – I think you said Ruth Nick, did they go back – did they come – were they working by you?

A Not that day.

Q So they were present at the worker's compensation –

A They had the day off.

Q Okay.

MR. COGNETTI: I object and move that it be stricken, You Honor. That is a supposition and speculation.

THE COURT: Yeah, the fact that they were there is all that she knows at that point. You haven't established

THE COURT: Sustained. Get a question on the floor, Ms. Pollick.

BY MS. POLLICK:

Q Who was yelling at you?

A Doreen Barrett and Ruth Nick.

Q Now, prior to this – prior to coming back to work after you had your baby, had you experienced that – the same environment ever at Eureka the preceding seven years you had been there?

A No.

Q Why do you believe you were placed on so much layoff in 2001?

A Because I filed charges with the EEOC, and I was told by Butch that if I dropped them charges that everything would go back to normal.

Q Now, did there ever come a time that your coworkers wouldn't show you how to do a job?

A Yes.

Q Can you tell the jury about that?

A I was upstairs working with Helene McGinnis and –

MR. COGNETTI: Your Honor, may we have a timeframe? I don't mean to interrupt you, but may we have a time when this happened?

THE COURT: The answer to the question was yes, Ms. Pollick. I think the next logical question is when, and then she can proceed with her answer.

BY MS. POLLICK:

Q When did this occur?

A It was in 2001, I don't know what month.

Q And if you could continue on explaining what was going on.

A I was on the cutting – the cutter machine, and I didn't know how to do the job because I never really worked upstairs, so it was a job I didn't know how to perform to do, and they refused to show me how to do the work. So my foreman upstairs, Cindy Taramelli, came over and had to force them to show me how to do the work.

Q Now, besides that incident when they wouldn't provide you with training, was there ever a situation when someone else wouldn't help you?

A Yes, Bob Hendrickson.

Q And who is Bob Hendrickson?

A Butch's brother.

Q And when did he not help you?

A That was in February 2001, on the nail machine.

Q And could you describe for the jury what transpired?

A It ended up that he – what happened was he had to be on one side of the machine to catch the checks as they're coming down, so when the checks were coming down and they

about the work environment during that year?

A It started getting more hostile, more slamming carts into carts, not liking the way my radio was on my desk, not liking the was I packed my work, or where I put my boxes. I went to my foreman, Butch Hendrickson, and I begged him to tell them to just stop and let me go in and do my job. He refused. He said they could do whatever they wanted to do, and he'll sit back and he'll watch.

Q Now, did there come a time that you had an interaction with one of your coworkers regarding the fact that your son was ill and you needed to care for him?

A Yeah, that was June of 2001.

Q Okay. And what happened in connection with that situation?

A My son had respiratory problems, so I had to take the week off of work.

Q When he was born, did he – was he born with respiratory problems?

A Yes.

Q Now, what happened when you wanted to take time off to care for your son?

A Butch gave me the time off, but the girls were hostile because when I came back they said this isn't a day care –

MR. COGNETTI: Your Honor, I don't want to keep

140

MS. POLLICK: I'm not offering it for the truth of the matter, I'm offering it for notice.

THE COURT: You certainly are on a harassment basis in the context of the question that you were just asking. No, that doesn't – you can't escape hearsay on that basis. You're offering it to show harassment. It is the truth under those circumstances. It's not notice.

Now, either you get more frequent questions on the floor or get questions that are designed not to elicit hearsay, that are not so general, because this witness is not listening to what I'm saying in terms of my rulings. Perhaps she doesn't understand, I don't know, but you understand, and we're going to have to get out of this because necessarily what's happening is defense counsel's got to repeatedly object, and necessarily that may raise in the jury's mind some adverse inference or that defense counsel is attempting to hide something, which they're not, they're attempting to appropriately protect the record.

Now, I'll get you out of this area if you don't start asking questions that are more clinical and not designed to elicit hearsay. All right. The objection is sustained as it related to the last question.

MR. COGNETTI: Your Honor, I'm going to ask for a specific remedy in that we take a five minute break and she instruct the witness and report back that she has so

149

MS. POLLICK: Your Honor, I would like to offer plaintiff's exhibit 18.

MR. COGNETTI: We have stated our objection, Your Honor.

THE COURT: All right, you may.

BY MS. POLLICK:

Q Could you read the doctor's excuse, the lower one.

A Robin Scott – "Wayne Scott has an upper respiratory condition. Please allow his mom, Robin, to receive phone calls or permission to leave when needed."

Q Now, what happened when you turned this note in, besides what you already testified to?

A Butch took the note, but the girls were hostile because I took that week off, and they were taunting, making comments, oh I got to get the fax, bring it down --

MR. COGNETTI: Your Honor, objection.

THE COURT: Sustained. Again, the jury will disregard what the coworker said as testified to by the witness. You'll disregard that, it is stricken, and is not within – it is not in evidence and will not be considered by you for any purpose.

Proceed.

BY MS. POLLICK:

Q Now, were you ever written up in connection – after you filed charges of discrimination?

THE COURT: Now go.

MS. POLLICK: You would have to amend every complaint to let – allege every retaliatory act –

THE COURT: make an offer with respect to what you're about to get into because I don't know what you're going to get into.

MS. POLLICK: That she was written up for the fact that she left her area to seek help from management to stop the harassment.

THE COURT: And this was when?

MS. POLLICK: 2002.

THE COURT: All right, we'll allow it.

MR. COGNETTI: Okay.

(Whereupon, the discussion held at sidebar between the Court and counsel was concluded.)

BY MS. POLLICK:

Q Now, what did you do that – what were you doing when you allegedly were disciplined; what were you doing?

A My foreman prior gave me permission to leave early to take my daughter to preregister for her kindergarten, and it was in March, and they went by your last name so I had to be done that last day. He gave me permission, and when I got back I was being yelled and screamed at. So I went out to the security shack to see if Butch Hendrickson or Ron Tully were available to stop the harassment, and both of

them were gone for lunch.

When Butch Hendrickson arrived the girls were there yelling and screaming at me in front of him. Still he didn't do anything. By three o'clock that afternoon I got written up for leaving my area without permission to go talk to a security guard to stop the girl from harassing me because I left early that day, but I did come back.

Q Now, did you ever leave the work area to go to a security shack prior to that?

A If you ever had problems, that's what we were informed to do.

Q Did you ever do that before this incident?

A No.

Q Did you ever leave your work area without permission?

A No.

Q Could you leave you area without permission?

A Yes, you never got written up for leaving your area without permission.

Q Did you have to go get permission like to go to the bathroom?

A No.

Q So you could just leave your area?

A Yes.

Q And were you ever written up for leaving your work

area any time prior to 2002?

A No, never.

Q And did you leave your work area prior?

A Yes.

Q Now, did you ever file any grievances over the treatment that you were receiving?

A I filed several grievances, and I begged everyone who I could find out to help me to try to stop the hostile work environment, but everybody would just sit – they refused to watch the cameras, they refused – I worked in the surveillance department. Everything could have been proven if Butch or –

MR. COGNETTI: Your Honor –

THE WITNESS: – Ron just watched –

MR. COGNETTI: – I vigorously object –

THE COURT: Hold it, please.

MR. COGNETTI: I object.

THE COURT: And your objection is?

MR. COGNETTI: The objection we stated before at the break.

MS. POLLICK: I don't think it's outside the scope.

THE COURT: I think it's unresponsive, actually. I'll sustain the objection. Get another question on the floor.

position?

A I – I don't know.

Q Now –

A I know I was never interviewed for it.

Q Now, can you tell the jury what's been marked as plaintiff's exhibit 46?

A It's another grievance.

Q Why did you file this grievance?

THE COURT: Now, consistent, counsel, with my ruling yesterday, you're going to have to lay a predicate for this or it's going to be objectionable. You just did that with the prior grievance, you have to do it with this.

MS. POLLICK: Okay. I'm not going to publish, I was going to ask her why she filed this grievance.

THE COURT: Go ahead.

BY MS. POLLICK:

Q Why did you file this grievance, Robin?

A I filed this grievance because somebody in their different classification was doing my job.

Q Okay. And what did you – why did you believe that person was allowed to do that? What did you think?

A Why I believed that that person shouldn't have done it?

Q No, let me try again?

A Sorry.

14

BY MS. POLLICK:

Q Now, as a result of this person performing your job, what – what was the result of this?

A I filed a grievance and I never heard nothing on it.

Q Okay. Could you read to the jury what your grievance states?

A "John Mowatt, vault control, is packing orders, and the foreman Butch Hendrickson is checking his work, and that is a journey woman's job and it caused me to be laid off as 12/10/01."

Q Now, did anyone from management sit down with you and talk about this grievance that you filed?

A No.

Q Did Ron Tully sit down and say, Robin, what's going on here?

A No.

Q Did Butch Hendrickson ask any questions about the grievance?

A No.

Q Now, can you tell me why you filed plaintiff's exhibit 45 – 47, excuse me?

A Because it was in retaliation of me losing my health insurance benefits, because of them retaliating me – against me again.

16

THE COURT: Go ahead.

BY MS. POLLICK:

Q Now, Robin, what did you – what section did you mark of the grievance?

A "Retaliated/loss of health insurance."

Q Can you tell the jury the details of it and if you would want to read from it you're welcome to do that?

A "Retaliating against Robin Scott for filing a sex and pregnancy discrimination grievance and for filing a worker's compensation claim. They are allowing John Mowatt to tape the boxes because the girls do not have enough time to tape them, which means they would have to call a girl back, and that would be me, Robin Scott."

"Also I lost my health insurance due to this. Butch stated to Robin Scott on the week of 3/19 to 3/23, not to count the checks because I would never get done. The orders are still the same size as they were in August and September of 2000, which they had two girls packing and one on the nail and this is a case of retaliation."

Q Now, did anyone from management sit down with you in connection with the grievance you filed on 3/28/2001?

A No.

Q Did Ron Tully sit down with you?

A No.

Q Did Butch Hendrickson talk to you about it?

A No.

Q Did anyone from the union talk to you about it?

A No.

Q Now, can you tell me why you filed plaintiff's exhibit 49?

THE COURT: 48?

MS. POLLICK: 48.

THE WITNESS: Because I was being harassed and retaliated again.

Q And what was the date of this grievance?

A 2/27/02.

MS. POLLICK: I would like to publish the grievance.

THE COURT: Any objection?

MR. COGNETTI: No, sir, Your Honor.

THE COURT: Go ahead.

BY MS. POLLICK:

Q Can you tell the jury what this grievance was about?

A It's about harassment and retaliation for filing a claim with Harrisburg.

Q Was there anything particular you were complaining about in this grievance?

A "Since I filed the complaint with the EEOC –"

THE COURT: Wait, let me stop you Ms. Pollick,

because I don't think your question asked her to read it, and I want to move the case forward for all purposes, and that would be plaintiff's case and defendant's case. It's certainly acceptable to have her paraphrase it. You're publishing it to the jury. It's your option obviously if you want to have her read the whole thing you can, but she can certainly paraphrase it.

BY MS. POLLICK:

Q If you can just not read it, but just express –

THE COURT: It's your option, I want to make that clear, but you didn't ask her to read it and –

MS. POLLICK: That's fine –

THE COURT: -- I want to make it clear that she doesn't have to read it.

MS. POLLICK: -- I have no problem with that.

THE COURT: All right.

BY MS. POLLICK:

Q If you could just not read it, Robin, just give like a kind of summary of the reason why you filed it.

A I filed charges with the EEOC. I was being harassed by my foreman, Butch Hendrickson, and by my coworkers who were on a daily basis, yelling, screaming at me. I asked Butch to please stop it, just to let me go in there and do my work, but he refused to stop the harassment, and he allowed it to happen, and I don't know why. All I

wanted was my pregnancy leave. I didn't want to be harassed. I just wanted to work for a living.

Q Now, why do you think that Butch Hendrickson allowed the harassment to continue?

MR. COGNETTI: I object to the form of the question, Your Honor.

THE COURT: Sustained.

MS. POLLICK: Your Honor, I don't – I'm just asking her why.

THE COURT: Sustained.

BY MS. POLLICK:

Q I'm going to show you what's been marked as plaintiff's exhibit 51 and also 50. I'm going to do them collectively so we can move through it.

MR. COGNETTI: We have...

MS. POLLICK: Pardon?

MR. COGNETTI: We're all right, I thought we didn't have them. We do.

MS. POLLICK: They should be in all books.

BY MS. POLLICK:

Q Robin, why did you file plaintiff's exhibit 50 and 51?

A Because I was being – MR. POLISHAN: Excuse me, Ms. Pollick. The book you provided doesn't have 50 in it.

MS. POLLICK: I'm sorry, I did provide you with a complete book.

MR. COGNETTI: No.

MS. POLLICK: Yes, I did.

THE COURT: Ms. Pollick, if they say they don't have it, they don't have it. Give them another exhibit, please.

MR COGNETTI: To speed it along just let us read yours for a minute, that will be fine. Thank you.

MS. POLLICK: You're welcome.

MR. COGNETTI: I'm sorry.

BY MS. POLLICK:

Q Can you tell the jury why you filed plaintiff's exhibit 50 and 51?

A Because I was being retaliated against for filing these charges with the EEOC against Butch Hendrickson and Ron Tully.

Q Who was harassing - retaliating against you?

A Butch Hendrickson was harassing me, and allowing my coworkers to harass me on a daily basis.

Q And –

A And retaliating against me for filing the charges through the EEOC.

MS. POLLICK: Now I'm just going to quickly publish the two grievances, but I'm not going to ask my client to read it.

BY MS. POLLICK:

Q Robin, could you just paraphrase plaintiff's exhibit 51?

A 51 or 50?

Q Plaintiff's exhibit 51.

A I have that.

Q If you want to go ahead actually and read it it will probably be quicker.

A "The girls in the TC department, Ruth Nick, Linda Littman, and Helene McGinnis are harassing me and singling me out. Linda made comments to me that she never saw a frigen asshole like me. She also made a comment when I grabbed a cart that – that I have a lot of balls taking that cart. I take a box, she makes remarks like you're an asshole. Ruth and Helene complain on how I do my work, and notes, and she's not my boss. They make comments on what bank I take. And if I miss a day of work, they say, you know -- "

Q Go to the second page.

A Read it?

Q Yes, do you have the second page of that? Just take that one.

A "—you're missing a lot of time. They complained about my radio, and if I made a mistake they have a cow at me. My foreman Butch commented to Ruth when she was looking in the telephone book if she knew any good psychiatrists because he was going coo-coo. And they looked at me when they said it. Helene complained about my boxes on my desk. She didn't even sit across from me. They sit at Ruth's desk complaining about me for minutes at a time. They yell at me in front of Butch about me not putting the FedEx labels in the boxes, and he said nothing. They make comments like they have to print the FedEx labels earlier because of that crybaby. I want to work in a nonhostile work environment and not be singled out."

Q Now, Robin, did Ron Tully or Butch Hendrickson ever sit down with you in connection with either of the grievances P-50 of P-51?

A No.

Q Did anyone from the union sit down with you and talk about these grievances and what was going on at the plant at this time?

A No.

Q Now, did Ron Tully ever investigate, interview any witnesses in connection with any of the grievances you filed?

A No

MR. COGNETTI: Your Honor, I object.

MS. POLLICK: On what basis?

THE COURT: The objection is?

MR. COGNETTI: How would they know?

THE COURT: She answered the question. Are you moving to strike?

MR. COGNETTI: I'll move to strike.

MS. POLLICK: I'll rephrase the question.

THE COURT: I'll sustain the objection because I think the basis of the objection is that she could not know, is that correct?

MR. COGNETTI: Yes.

THE COURT: The objection is sustained. The jury will disregard the answer regarding what investigation was made by Mr. Tully.

Get a question on the floor.

BY MS. POLLICK:

Q Were you ever given the result of any investigation if it did occur?

A I was never told nothing about the grievance.

Q Now, did you ever – did Butch Hendrickson ever let you know the results of any investigation if he did one?

A No.

Q And no one sat down with you and talked to you about what you had written?

A No.

Q Now, did there come a time that you asked to see

psychologist or even a counselor before you saw Diane Hoffman?

A No.

Q Did you ever have those emotional problems that you were having any time the prior seven years that you worked for Eureka?

A No.

Q Now, can you describe the work environment in October 2003?

MR. COGNETTI: Your Honor, our objection is exhaustion and the scope.

MS. POLLICK: Your Honor, I'm giving background information about what happened. I think the jury should be able to hear exactly what happened. It's not stating a new claim. It's based –

MR. COGNETTI: Judge, Judge, may we do this at sidebar, please, because I'm being made out to look like an ogre here. Objection.

THE COURT: No, No, I'm going to sustain the objection as it relates to the general question. Is it October 2002, or what was the question?

MS. POLLICK: 2003.

THE COURT: No. The objection is sustained.

MS. POLLICK: Okay. Your Honor, I would like to admit a part-opponent admission.

a hostile environment found by the unemployment comp. That concept, as a legal term of art, is very different in this context, and to have that evidence go to the jury would confuse and mislead them, to think that there's been a finding that a hostile environment finding –

THE COURT: You're going to have to get closer to the mic.

MR. POLISHAN: I'm sorry. The objection is that plaintiff's counsel is trying to elicit –

THE COURT: Well, let me stop you. I understand the objection.

MR. COGNETTI: I have a better objection, You Honor. They didn't fight it. Nobody showed up. They only heard from her. That's self serving, and it's out of the scope.

THE COURT: What are you trying to say –

MS. POLLICK: She can certainly say why she – what she put down on the unemployment; it's not hearsay. How is it objectionable? What grounds are they objecting to it?

MR. POLISHAN: Well –

THE COURT: The – you asked the question did they fight it, which was objectionable, among other reasons, because it's leading. Now, as I understand it, she applied for unemployment – what point in time are we talking about?

MR. COGNETTI: 2003, You Honor.

THE COURT: We're outside the ambit, and I've got to draw the line someplace, and I already drew the line in October, at least October of 2003. This is post October 2003 I assume.

MR. COGNETTI: Yes.

THE COURT: I'm going to generally bar anything about the unemployment compensation claim. I think it is tangential. It is irrelevant. I've got to make a judgment call here. I think it is not relevant to this proceeding.

MS. POLLICK: Thank you.

(Whereupon, the discussion held at sidebar between the Court and counsel was concluded.)

BY MS. POLLICK:

Q Now, Robin, why do you believe you were forced to leave Eureka in October of 2003?

MR. POLISHAN: Objection, leading.

MS. POLLICK: I said why.

THE COURT: No, the objection is overruled. It's her belief.

BY MS. POLLICK:

Q Go ahead, Robin.

A Can you – I forget what you said.

Q After – why do you believe you were forced to leave Eureka in October 2003?

THE COURT: All right, the objection is sustained now to that question based on the Court's prior ruling. It's October 2003; I missed the date. No, the objection is sustained. That period is not in play, counsel.

Next Question.

BY MS. POLLICK:

Q Now, how long did you work for Eureka totally?

A Ten years.

Q And did you have any intention of ever leaving Eureka in 2000?

A 2003?

Q No, 2000, before the events of this happened?

A No, I thought I was going to be employed with them forever.

Q Now, were you subject to any of the testimony that you gave – were you subject to any of that treatment by your coworkers and Butch before you filed charges of discrimination and you requested pregnancy paid leave?

A No.

MS. POLLICK: Nothing further, Your Honor.

THE COURT: All right. Let's start cross examination. I don't think it's appropriate to take a break yet, we'll start with cross.

MR. POLISHAN: Judge, I'm sorry, I have some papers to spread out. Maybe I can move the easel so the jury can see.

Q And then on September 13, you handed in a note at work from Work Med, correct?

A Yes.

Q And that note restricted you to sedentary work, right?

A Yes.

Q Now, regarding September 13th, you talked about an incident that Darlene Cortese was present at on that day, correct?

A Yes.

Q And that involved a discussion with Mr. Hendrickson about a not from Dr. Davis, correct?

A Yes.

Q And Darlene Cortese was not an employee of Eureka, correct?

A Yes.

Q And she did not know anybody at Eureka other than you, correct?

A Yes.

Q And in fact, the only reason Darlene Cortese was with you at Eureka is because she's your friend, correct?

A No, she was there because I – she didn't want me to be harassed or get emotional during my pregnancy, that's why she was there.

Q But she is your friend.

doing it the way the union wanted?

A But they never told me that these grievances were in jeopardy of doing it. I always got them there plenty of time ahead of time.

Q I'm sorry, I didn't get to finish my question.

In the context of them telling you about that jeopardy you were creating, do you remember them also saying that you were wasting time by the way you were filing grievances?

A I don't recall that. I just remember that there was no union steward there, so who do you give a grievance – you can't give a grievance to management if you have no union steward. Who do you give a grievance to if you don't mail it in? And that's when they got Mike Ghilardi.

Q In the context of those same discussions, do you remember being told by the union representative that the union would do everything in their power to help you with any problems, but when you don't follow the terms of the contract you make it difficult for them to do so?

A The union refused to help me in the hostile work environment. They said it wasn't their job, and they told me if I want to I could take it to a magistrate.

Q So I'll take that to mean that you don't remember.

A I talked to Jack Nolan, and he told me to stop

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70

hostile work environment it wasn't a union's job, and that I had to take it to a magistrate, to work in a nonhostile work environment.

Q Well, the union did try to have a meeting regarding your grievance about a hostile work environment, correct?

A Yes, but it was two months later after I filed the grievance, and they wanted me to go up and in front of five girls and intimidate me and – and say – there was going to be five girls here standing here saying she was the harasser. They failed to file grievances saying that I harassed them. I filed these grievances over and over again, and they refused. It was intimidating. I was an emotional wreck because of what they were putting me through.

If I went to that arbitrator, and – not arbitrator, or that meeting, you honestly believe five girls are going to admit that they're harassing me. All the union had to do, there was a surveillance department, is watch the cameras. Why couldn't they do that? Why couldn't – why couldn't Butch watch the cameras? Why couldn't Ron watch the cameras? One reason, because they were retaliating against me for filing the charges with the EEOC, and I begged anybody who could help, but no one refused (sic) to help me, because they didn't care.

Q I'm sorry, I'm getting a little lost because it's a

83

Q Now, pretty soon I'm going to get into what actions actually occurred that you consider harassment, but first I want to make clear what these actions were not. Okay?

For example, in plaintiff's exhibit 51, you talked about various statements that you say – and let me give you a copy of 51 since I'm talking about it.

A Got it.

Q Okay, and you have both pages?

A Yeah.

Q Okay. In plaintiff's exhibit 51 you talk about various statements that were made by either Ruth Nick, Linda Littman or Helene McGinnis, correct?

A Correct.

Q And that's why in the grievance, plaintiff's exhibit 51, you said that the girls in the TC department, Ruth Nick, Linda Littman and Helene McGinnis are harassing me, singling me out, correct?

A Yes.

Q And you do not think that they were doing that because of your sex, correct?

A They were doing it because I filed pregnancy discrimination, and they told me that I should not be entitled – that pregnancy should not be entitled to the same thing as people who have a heart attack. They told me they don't choose to have a heart attack, so why should I be

work, didn't you?

A I cried sometimes, I didn't cry all the time. When they were harassing me, names hurt, the comments that people called – they called my baby the anti-Christ child. That made me feel – why would a woman call a child the anti-Christ child? The child didn't chose (sic) to be born. I'm the one who had the baby. What gave her the right to call my baby the anti-Christ child? My baby I almost lost because it did go into fetal distress.

Q I want to make it really clear, you talk about this anti-Christ comment. Number one, it's not mentioned in plaintiff's exhibit 51, and it was not made by any of the people we've been talking about here, not Helene McGinnis, not Ruth Nick, not Linda Littman.

A It wasn't said at that point in time, it was said in 2000 when I had my baby. They called – they said that they –

Q No, no, stop for a second.

A -- that my baby was the anti-Christ, and they were going to have a witch hunt when I came back.

Q Okay, I want to make it clear because you're being very inexact with the way you're saying things in conclusory, broad stroke fashion. The jury needs to know what really happened –

A That's what –

99

Q -- what people at what time. Hold on.

You're talking about "they" calling your baby the anti-Christ, okay. You're purportedly talking about one person one time, correct?

A I am talking about two persons –

Q Hold on a second.

A -- Karen Smargiassi and Helene McGinnis.

Q Now, did someone say this to you directly? Let's make this clear.

A I –

Q Excuse me, did someone say this to you directly?

A Not at first, but I went and I asked them.

Q Hold on a second. Did someone come up to you and say your baby is the anti-Christ?

A No, I heard it.

Q Okay. Now –

A But then I went up to them, and I asked them if they said it, and they said yes, they did, what are you going to do about it.

Q I want to ask you something. If I come over here and say something bad about you, out of your hearing, I'm not intending to hurt you, because I'm not saying it to you, correct?

A I don't get what you're trying to get at –

Q Let's put it this way –

109

that they were complaining about you playing your radio at work. You had disagreements about that.

A There was only one lady who complained, and she was nowhere even near me to complain about my radio.

I said it was there since 1993, Nolan complained, so I figured why are you complaining now. And Butch never told me I couldn't have my radio. Other people at their desk stations, like Sue Banicky, she had a radio. Nobody complained about her radio, they just tried to find little odds and ends to complain about.

Q And the point is, none of these comments were coming from Butch Hendrickson. They were all coming from these girls in the TC department.

A Yeah, but he sat back, he was there, he heard it, and he did nothing. I went to him and I asked him, again, tell them to stop. He did nothing.

Q Now, when you used the phrase, sometimes when you made a mistake, the other girls would have a cow at you. What you meant by that is they would get very very angry, I guess in your opinion an over reaction about their disagreement with the way you did something.

A See what happened was I made a mistake once, the one number was off. The one girl came over and it was Helene McGinnis, she came over and she freaked out because she didn't like the way I had my boxes stacked on the desk

Q Well, that's how you described it in you deposition from November 2004. Take a look and see if ...

A Yes.

Q And the problem was you never did it like that before, right?

A Yes, right.

Q So you refused to do it, right?

A Yes, but since 1993 I never did it before, and I was still working, it wasn't like I was sitting around doing nothing. If I would have got done early, I would have did it, but I was still working, I was still doing my job.

Q I just want to make it clear. This is not something you ever got written up for, or got a written warning. This is just the comments coming from the girls in your department, right?

A Yes.

Q So it seems like looking through everything that you've gone through here in this description that you were getting this coming and going, so to say, in your department, that's how you felt, right?

A I was being harassed because I filed the pregnancy discrimination, and they were retaliating against me, and Butch Hendrickson and Ron Tully refused to stop it. I begged for somebody to stop it. I even begged my union to have it stopped, and they all refused.

20

Q I understand that, but I'm asking you now, between August 11th of 2001 and September – or August of 2001 and September 11th of 2001, did you have any contact with Mr. Tully?

A I don't believe so.

Q Now, the only contact you had with Mr. Tully, that was on September 11th?

A Yeah, when he cursed at me and he –

Q He cursed at you.

A Yeah, he told me get – get the F out of here, because I told him I contacted the EEOC. He was really really mad.

Q And is that the day he yelled at you?

A He screamed at me, because I told him I contacted the EEOC, and he flipped – flipped a thing. But when he –

Q Let me ask a question. Let's try to stay with the question and answer routine, okay?

A Yes.

Q On September 11th, that's the time that you got hurt, correct?

A Yes.

Q And that's the time the ambulance came and took you from Eureka, correct?

A Yes.

Q And you were injured at your desk.

45

THE COURT: The objection – and objection seems to be extraneous materials in the file such as handwritten notes. You're not going to refer to these that are in the front of the file?

MR. COGNETTI: No.

THE COURT: What I also can see in the file is that there are – there are what appear to be on – there appear to be without question certain documents that look like they are authentic, and my understanding is you're going to use those to demonstrate when she was excused from work?

MR. COGNETTI: Correct, Your Honor.

THE COURT: Well, that's fair game. And to the extent that it goes into 2003, so that my ruling is not misunderstood, what I was talking about and what I referred to in my ruling had to do with her claims or causes as they occurred in 2003. She did testify that she worked through 2003. It's – it's apples and oranges. And so I'll allow some latitude in 2003 as it relates to the excuses.

No, I think that it's an appropriate cross examination. There's no showing that it's not authentic. It's not what your contention is.

MR. COGNETTI: If I'm more than a minute and a half. shoot me.

THE COURT: Let's proceed. Get the jury.

(Jury enters courtroom.)

55

that reflected what occurred in the TC department?

A They gave us I think two hours, and they refused to have Cindy's paralegal in there with me.

Q Did you get an opportunity to –

A I got on day, and a lot of the tapes were deleted.

Q They were deleted?

A It said deleted on it.

Q Okay.

A If they didn't do –

Q There's no question pending.

Could you tell me one person who was jumped ahead of you on the seniority list and was called back to work over you?

A Karen Smargiassi.

Q Anybody else?

A John Mowatt did my job.

Q John Mowatt. Anybody else?

A Robin Kutchmanich. They brought John Fedica down.

Q And when did this occur?

A Days I was off.

Q How do you know that?

A Because Jack Kushmarick told me.

Q Did you see anyone, besides your hearsay knowledge or third-hand rumors, of anyone who came in and worked in your place who was lower in the seniority list?

143

Q And you mentioned Karen Smargiassi.

A Smargiassi?

Q Smargiassi. And she had a higher seniority in the binding department than you did, didn't she?

A No, she didn't, she was one below me.

Q In the binding department.

A No, she was one below me; I was higher in seniority than her.

Q In the TC department and the binding department?

A Correct.

Q Okay. And you mentioned in response to Ms. Pollick's question that the company had some responsibility to – for your grievances, do you recall that dialogue you had with her about five minutes ago?

A Yeah, they had – they posted a hostile work environment and –

Q My question, when you had a grievance you gave it to the union steward, correct?

A Yes.

Q And it had to go through the union grievance process that has been dictated in the contract that was entered into between your union and Eureka.

A Yes, but according to that policy they had, they – I was told that you go to management, if you feel that you're being harassed, management will take care of it.

BY MS. POLLICK:

Q Hi, Darlene. Who do you work for currently?

A Self employed.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q How many children?

A One.

Q And what is your husband's name?

A Tom.

Q How do you know Robin Scott?

A We're friends, I've known her for years. My husband is their son's godfather.

Q Did there come a time in September 2000 when you went with Robin to Eureka Security Printing?

A Yes.

Q Why?

A I know prior – earlier in the week she had a problem where she got taken in an ambulance, and I believe it was a Wednesday, she called me, she needed somebody to go up with her because she was afraid. She wanted to give them a doctor's excuse, and I said I would do it. I left work, and I went up with her and she went to hand them the excuse. I met her up there, and they didn't want – he didn't want to take it.

Butch – and they made us wait there, oh my goodness, probably about 40 minutes and they came back out, and just the way he talked to her. I mean he was really ignorant, and I could see why she wanted somebody by her side.

He at one point was in her face like right here, and I mean she's pregnant, and I felt really bad for her, and I could see she was starting to get choked up, and I was just like more or less, Robin, Go sit down. I said, Put your chin up. And he goes, Who are you, her lawyer? And I said, Excuse me, my name is Darlene. And he wouldn't take the excuse. And he said that she – he called the doctor or something and she could work, and they have a lot of attorneys. And at that point we had left and went down to the doctor's office to get an excuse that specifically stated she couldn't work.

Q And how was her emotional state after you left?

A When we walked out of there I said, You know what, when I came here I thought I came as a friend for support. I said, You need a bodyguard to go in there. That's exactly what I said to her when we walked out of there, I felt bad for her. I was even shaking myself.

Q Now, how was she when she contacted you to go with her before you actually arrived?

A She was shaking. She didn't want to go. She didn't definitely want – didn't want to go up there by herself.

Q Had she told you what happened on a prior occasion?

A Just that she had the incident on Monday where they had to call the ambulance, and...

Q And now do you recall Butch Hendrickson - would he accept that note?

A No.

Q Did he give it back to her?

A At first he wouldn't even take it from her, and then he just grabbed it and just like smushed it in his hand and walked out. And then we waited there for a while, he came back in, and he said he talked to the doctor, and she could work, and you better get back to work; like more or less he was saying things like that to her.

Q So you specifically recall him saying that he spoke with Dr. Davis?

MR. POLISHAN: Objection, leading.

THE WITNESS: Well, I though –

THE COURT: Hold it ma'am. When there is an objection, you must not answer the question.

MR. POLISHAN: Withdrawn.

THE COURT: The objection is sustained.

157

MS. POLLICK: I'm calling Renee Neff to the stand, Your Honor.

THE COURT: All right.

RENEE NEFF;

called as a witness on behalf of the plaintiff, having been duly sworn or affirmed according to the law, testified as follows:

THE DEPUTY CLERK: State your name and spell your name for the record.

THE WITNESS: I am Renee Neff, R-E-N-E-E, N-E-F-F.

DIRECT EXAMINATION

BY MS. POLLICK;

Q: Ms. Neff, who do you currently work for?

A: Giant Foods.

Q: How long have you worked for them?

A: Four years.

Q: Did you work for Eureka Security Printing at one point?

A: Yes.

Q: What was your position?

A: I worked in the TC department.

Q: Who did you work with?

A: Butch Hendrickson and Robin Scott.

Q: Were there any other women that worked in the department that you recall?

158

A: Yeah, Ruthy, Susie, Karen, and Amanda.

Q: Now –

A: And Doreen.

Q: In September 2000 were you present when Robin Scott got injured on the job?

A: Yes.

Q: Can you describe what you witnessed?

A: I had come out of the bathroom, and she was crying, and I didn't know what had happened, and I asked what happened, and she said that she hurt her back. She was picking up a check or dropped a check or something on the floor and was picking it up and injured herself.

I went over, sat down, and I know that Butch asked her if she wanted the ambulance called, and she said yes. Then Ron Tully came in and he went over to her and asked her what happened. And she was crying pretty hysterical, I guess she was hurting, and she was trying to tell him, and he said, Well, you did this, you did this to yourself, you did this on purpose.

And then she even got even – more crying even more. He left, and then I asked her if she wanted me to call her husband, and she said yes. So it took a few minutes for me to get the phone number out of her. She was in a lot of pain. And I went in and called her husband. And when I cam back out Ron Tully was there again, he walked up to her, and he took and slammed papers down in front of her on the table, and he said, Sign there, this is all you're entitled to and this is all you're going to get. And then she started crying even more, and then he threw up his hands, he just said, Get her the hell out of here, get her the hell out of here now; and then he left.

Q How did Robin react after he left?

A She was hysterical. She was crying a lot; she was in a lot of pain.

Q What was – what was the reaction of the other girls in the department?

A Do you know, I – I don't know. None of them came over to where I was. Ruthy was probably maybe five feet away, and the other girls had to be further than that away. And I don't remember talking to anyone else because once the ambulance showed, they sent me out of the TC department.

Q Now, after that day did you ever see Robin Scott crying or upset at work?

A She – at times, yes. She cried quite often, a lot of time when the girls were like shunning her or they didn't talk to her or they were mad at her for some reason. I mean ever before that day, you know, she has like I guess problems where she would go into the office, and she had said something to Butch, and the other women would get called in every now and again.

161

THE COURT: Actually, Joan, read back the question.

(Question read.)

THE WITNESS: I only remember one time where I was told that we weren't called back to work because Robin had to be called back before we were called back, and Nolan wanted her back, they didn't want to bring her back, that she was a troublemaker.

BY MS. POLLICK:

Q Was this after she had filed –

MR. COGNETTI: Your Honor, could we have an identification of who?

THE COURT: At this point, unless you tie that up, I'm going to strike that answer.

MS. POLLICK: Sure.

BY MS. POLLICK:

Q Who said that?

A Okay. I was told by Cindy, who was a manager from upstairs, and from the other –

THE COURT: Now, wait, told what, you were told that statement?

THE WITNESS: Yes, that she – that we weren't called back to work because they didn't want Robin back. They didn't want her to be called back.

BY MS. POLLICK:

Q And when was this, approximately, when was this?

A I don't know. We were laid off for a while. I don't know the times, I really don't.

Q Do you know if it was after she had gone out for – and had her baby?

A Not – no, not this – no, not that I remember.

Q Okay. Do you recall if it was in 2001? What would help –

A I wasn't there in 2001 that I know of.

Q Did this – what would help refresh your memory as to the timing of it, anything?

A Well, I know she hadn't had her baby yet when she had filed papers, she was trying to get some kind of maternity leave or something, that's the only thing that I know.

Q Okay. So all you know for timing that she had requested some leave, but you don't know – but she had not had the baby yet.

A No, right.

Q Okay. Now, did Ron Tully ever sit you down and ask you what was going on in the work area in 2000.

A No.

Q Did Butch Hendrickson ever sit you down and ask you what was going on in the TC department?

A No.

Q Did anyone from management ever talk to you about ___

165

A Right.

Q And let's see. And you did work at least some of the time in the TC department with Robin Scott, and most of your coworkers there were women.

A Yes.

Q And you never harassed Robin Scott, correct?

A No.

Q And you were never a victim of gender discrimination at Eureka, right?

A That's a hard one to say. Most of the time it was just hearsay that they didn't like women to work the machinery, they didn't want women to work the machinery, and if I signed up to do the machinery upstairs, that I wouldn't get the job because I was a woman, but I did get the job up there. They did train me up there.

Q So you did do the job up there anyhow.

A Yes.

Q You just heard some hearsay and it was all women working in your department, in the TC department?

A And a couple men, yeah.

Q Right, and some men too.

THE COURT: Mr. Cognetti.

MR. COGNETTI: I have a couple questions, Your Honor.

170

called as a witness on behalf of the plaintiff, having been duly sworn or affirmed according to law, testified as follows:

THE DEPUTY CLERK: If you would just state your name and spell it.

THE WITNESS: Amanda Rumford, A-M-A-N-D-A. R-U-M-F-O-R-D.

DIRECT EXAMINATION

BY MS. POLLICK:

Q: Ms. Rumford, when did you work for Eureka Security Printing?

A: I started in '99.

Q: What was you position?

A: TC department at first, and then upstairs.

Q: Who did you work with in the TC department?

A: Boss wise or people?

Q: People wise, coworkers?

A: Oh, Ruthy, Susie, Robin, Renee, Doreen.

Q: Now, did you have – did Robin have more seniority than you?

A: Yes.

Q: Now, after Robin had her baby, did you hear any statements that were made about her baby at all by management?

MR. COGNETTI: Your Honor, it's Mr. Tully and

Mr. Hendrickson on trial. If we could limit the questions to Mr. Hendrickson and Mr. Tully.

THE COURT: What is the relevance of anybody?

MS. POLLICK: Well, I think it's all management, Cindy Taramelli was management and ---

THE COURT: What is the relevance to this case?

MS. POLLICK: It goes to the environment, Your Honor.

THE COURT: No, not in that context. No, no. The – no, the objection is sustained on that question.

BY MS. POLLICK:

Q: Now, did there come a point you were laid off in 2001?

A: In 2001, What month, because 2001 I walked out.

Q: Okay. Now ---

MR. COGNETTI: I didn't hear that last statement.

THE WITNESS: I said 2001 was when I walked out, quit my job.

BY MS. POLLICK:

Q. Now, in the early part of 2001, were you working or were you on layoff status?

A: I was on layoff status, came back and was working second shift.

Q: What were you told why you were laid off?

A: I was told that –

BY MS. POLLICK:

Q: Ms. Rumford, could you tell the jury, describe for them the work environment that you were in in 2001 when you were there?

A: Well, the environment there as so horrible at times that it made it unbearable to work. There were times a few of us were in tears, me, Robin Scott. The women would harass, harass, talk about you, call you names, whisper behind your back, say that you made mistakes on recurring bases. There were instances where I had confrontations with several people.

I had to hear talks about her child being – the one she was having, going to be born, it was going to be the anti-Christ, situations that were just so vulgar and disgusting that you just didn't – sometimes you didn't want to come in, and sometimes you had to leave. You had to cry. You had to speak your mind, whichever – however you dealt with it. It was just – it was a bad, bad environment to work in.

Q: Did you ever witness any of her female co-workers harass her?

A: Oh yes, I did.

Q: After she had her baby.

A: She was – well, the comment I made earlier was – there was a comment made from Helene that when her – her

child was going to be the anti-Christ. There were comments from, from Karen that she shouldn't even be having any more babies, she wasn't a good mother. There were whispers and there were things that were said lightly enough to where you could hear them, and knew who they were being told. There were times that she went to the – she got into tears and went to the restroom. There were times that – that she broke down right there at her desk. She went home sick sometimes. She went into the office a few times to discuss the harassment.

Q Did her – did you ever witness anyone refusing to help her at all?

A Upstairs, when she got upstairs, Nolan would train her on a specific job. And it got so bad that Cindy, our boss upstairs had to come over and yell at a few of the women. It was Linda, Helene and Karen, for not wanting to train her because they didn't like her. Linda made the comment that I'll – I'll quit or be fired before I train that woman. So Cindy had to come over and ultimately train her because Nolan – Nolan would do it.

Q Now, if you can describe when you saw Robin Scott crying or upset at the work site after she came back from having her baby, if you can recall any of that and describe it for the jury?

A There were times when, when mistakes were made, and

176

instead of going to the person and saying, you know, I found this mistake just to let you know, they would all sit around and whisper and talk, you know, she doesn't know what she's doing, she can't get anything right. And it was loud enough where she could hear it. We could all hear it. And she would get upset, and she would go into – she would come over and she would be crying. And she went – she'd go to the restroom, and she would be – she'd come out and say that she got sick or that she wasn't feeling well. And she would just be in tears. She was just an emotional wreck at times.

Q Now, do you know if there's chemicals at the plant?

A Oh yeah, a lot of us – a lot of us would get sick at times. Headaches, nausea, you – we just sometimes had to – some of us if we got really bad we were allowed to go upstairs for a few minutes, get some fresh air, have something to drink, and then come back downstairs.

Q Now, were you ever interviewed by Butch Hendrickson concerning Robin Scot and he making any complaints of harassment or retaliation?

A No.

186

A Shortly after it was done because she made it known that she filed charges.

Q How was the environment for her after that?

A Oh, worse. There were comments from Bob Hendrickson that there are no-

MR. COGNETTI: Your Honor, I think we're way beyond the scope, and it's hearsay.

THE COURT: The hearsay objection is sustained.

BY MS. POLLICK:

Q Now, was there any comments made by Butch Hendrickson in connection with after she had filed charges?

A No.

Q Do you know if he spoke with any of the girls or guys that, you know, stop making any statements about Robin Scott filing any charges?

A No, not that I'm aware of.

MS. POLLICK: Nothing further.

MR. POLISHAN: You Honor, one question please.

RECROSS EXAMINATION

BY MR. POLISHAN:

Q One more question.

A Okay.

Q The bad treatment that you saw Robin Scott suffered through.

A Yes.

Let's take a break.

(Whereupon, a recess was taken from 3:35 p.m. to 4:00 p.m.)

MS. POLLICK: I call Mr. Hendrickson on cross pursuant to Rule 611.

FOREST HENDRICKSON,

called as a witness on behalf of the plaintiff, as on cross, having been duly sworn or affirmed according to law, testified as follows:

THE DEPUTY CLERK: State you name and if you'll spell your name for the record.

THE WITNESS: Forest Hendrickson, F-O-R-E-S-T,
H-E-N-D-R-I-C-K-S-O-N.

DIRECT EXAMINATION

BY MS. POLLICK:

Q Hi, Mr. Hendrickson.

Now, you'd agree with me that Robin Scott requested paid medical leave because of her pregnancy and related complications, correct?

A She requested, yes.

Q And Eureka provided paid medical benefits to its employees who were unable to work because of a medical condition, correct?

A Yes. yes, ma'am.

Q If you want to, please refer to defendant's exhibit

THE WITNESS: No.

THE COURT: Wait, wait.

MR. COGNETTI: That is not what he said.

THE COURT: No, that's not a fair characterization of his answer. The objection is sustained.

BY MS. POLLICK:

Q Did you read the information that Robin Scott provided to you regarding pregnancy discrimination and being – getting paid medical leave?

A The book she gave me?

Q Yes.

A No, ma'am, I handed it back to her.

Q Okay. So you did not – she gave it to you, you didn't choose to read it.

A I didn't think I was qualified to read it.

Q Did you take it to someone else?

A No, ma'am, I told her I can't accept it because I don't – I wouldn't understand it, I'm not a lawyer.

Q Okay. So your – your worker comes to you and says here is the law, that this is why you should be paying me for my medical leave, and you just told – you just told her I can't – I'm not qualified for this?

A Yes, ma'am, that's exactly what I said, I can't read this.

Q And you don't think you owe all your workers a

203

responsibility to know that law?

A I knew my job. I knew how to get the production out. I worked with the people. I worked with every girl in there, never had a problem. We would sit around every day, we would talk. The girls would bring me in recipes. I knew all their families and that. I don't think I had a problem with any of the girls except Robin.

Q Well, and it was only until after she wanted paid medical leave that you had a problem with her, correct?

A I would say it started then, right.

Q And it continued all the way until she finally left, correct?

A Yes, it did.

Q So back to you – you don't think it's – did you ever go to Ron Tully and say, you know, Robin came to me with this pregnancy discrimination law that says I have to – she said I have to get her paid leave. I can't understand it, what do we do?

A I took every slip of paper that Robin gave to me, I was instructed by Mr. Nealon, give it to Ronnie, they would review it and return it to me.

Q Did you take the law that Robin Scott gave – wanted to give to you to show you what the pregnancy laws are, did you take that to Ron Tully?

A I don't recall. The book?

210

what – what type of investigation you did and what the results were?

A I don't believe I have any.

Q Now, for paid medical leave of absences, all an employee has to do is bring a doctor's excuse in stating that they cannot work because of a medical condition, correct?

A That – if I had an excuse for a paid medical, that would have to go out through payroll. Denise – the front office would have to clear that. I would take any excuse for a paid medical out, and that would have to be cleared through management, not – upper management. I consider myself lower management.

Q If you could turn to page 100 in your deposition, and if you can read line 11 and 16.

A Okay. "Question. So in your mind when somebody requests medical leave, it can't be medical leave associated with the pregnancy? Answer. Whenever somebody brings in a doctor's excuse for medical leave, we usually honor it."

Q And what is next?

A Then it says, "We always honor it, for medical leave."

Q Yes. So all someone has to do it bring in a medical – a doctor's excuse, correct?

A A doctor's – yes, ma'am.

211

Q And you would agree with me that Robin Scott brought a doctor's excuse in to you, which is marked as plaintiff's exhibit 2. If you want to get that back right there to the left.

A Okay. I see it.

Q Did you ever receive plaintiff's exhibit 2?

A Yes, ma'am. Robin Scott handed that to me from Dr. Thomas.

A "Temporarily unable to work due to chemicals in the plant. Needs to stay off her feet."

Q And that's dated 9/7/2000, correct?

A I don't see a date on it.

Q On the end, the last part.

A Oh yes, ma'am, 9/7.

Q Okay.

A 2000.

Q And you did not accept this excuse, correct?

A Yes, I accepted this excuse. This one here? Like I say, all these excuses that came in were turned in to the office.

Q You can turn to page 10 –

A I talked to Robin Scott about the chemicals in the plant, in the TC department. Her and I agreed that there

25

don't recall.

"Question. The first one, I believe it was chemicals, so let's go with that."

"Answer. That's chemicals.

"Question. Yes. Did you honor that excuse?

"Answer. No."

That's what you stated back in –

A Can I explain this excuse here?

Q I just want to – if you can answer my question, then by all means you can explain whatever you want, but back in 2003 isn't it true that you stated to me under oath that you did not honor that excuse?

A I may not have honored it, but it was taken out to the office and what me question this is she got – she was on voluntary layoff the week that she turned this in. It was dated 9/7. And under – it says there that her care is going to start from 9/11, up on the second line from the top, until 10/22, and she wasn't even there then.

So I didn't know what to do with it. I took it out to the office. That confused me.

Q Okay. So you're stating today that –

A I did not accept it. The office had it.

Q Okay. So you did not accept this excuse, and you

52

Q Okay, you're assuming that everything – that they talked about the excuse at the meeting with Ron Tully after production, correct?

A I'm assuming. I never sat in on one, but I was told they were. That's when the decisions were made.

Q Okay, but you have no recollection – you cannot tell me that that actually – that the plaintiff's exhibit 1 was ever discussed with Mr. Nealon and Mr. Tully.

A I believe everything –

THE COURT: Now wait, sir. Asked and answered, let's move on. Let's move through this line of inquiry because you're going back to what you already asked. Let's keep going.

BY MS. POLLICK:

Q Plaintiff's exhibit 3, was, did Robin Scott receive paid medical benefits as a result of turning an excuse in, plaintiff's exhibit3?

A Paid medical?

Q Yes.

A No, I don't believe, no, she never got paid medical. She was – she was told to take the Family Leave Act for her pregnancy.

Q Okay. And that does not – the paid medical is for any illness, correct?

A I don't work in the front office. Paid medical

I've seen them in there. I've let them through with my card swipe, because you had to have management let them in. But I never walked with them. I never got results.

Q Okay.

A If there was something afoul they would be in there in a heartbeat to shut you down.

Q Okay. I'm going to show you – refer you to plaintiff's exhibit 4. If you can pull that document up. And this was an excuse that Robin – another excuse that Robin Scott brought to you from Dr. Davis. And you would agree with me that this doctor, Dr. Davis, is recommending that beginning September 11th that Robin stop work completely, correct?

A Yes.

Q And the company did not accept this and provide paid medical leave to Robin Scott based on receipt of this document, correct?

A We got this excuse, it says "I have recommended beginning September 11th." I knew everything we were going through. I asked her will you please go back and get one that says you're not to work. Get the word recommended out of there because that does not tell her to stop working, that recommends she stops work.

Q The doctor is recommending that this patient stop working, isn't that right, Mr. Hendrickson, yes or no, sir?

And by all means you can explain there – that. Yes or no –

A It says, I have recommended beginning 7 -- September 11th that she stop working.

Q And this – yes, that's what it says, right?

A Right.

Q And this doctor has special knowledge that you don't have, correct?

A Oh yes.

Q And he is recommending as a medical physician that she stop working, right?

A He recommended, he didn't say to stop.

Q He says that I have recommended that she stop.

THE COURT: Let's move on, you're repeating the same question Ms. Pollick. I'm going to have to—

BY MS. POLLICK:

Q That wasn't good enough for you, right?

A Recommend was not good enough for me, right. I asked her to please go get another excuse that would make it more clear.

Q And she did, right?

A Yes, she did. And then she –

Q She had to run down to the doctor's office, when she's nine months pregnant and get another excuse for you, right?

67

decision to accept it. But this one did not have recommended. I know this one would fly right through.

Q Based on this letter did you provide Robin Scott with paid medical leave forms?

A Paid medical leave forms?

Q Correct.

A No, I – I believe I asked her to take the family leave papers.

Q Okay. So, again, you weren't letting her the option of getting paid, you were telling her it's covered by family –

A Well, that was by the contract I had no other choice, and the she – no, this wasn't the excuse. I think the next day she came back and she wanted workmen's comp papers or paid medical, and I said – maybe this is the one. I'm confused about these two excuses.

Q Okay. But nonetheless, you didn't provide – Robin Scott did not receive paid medical leave benefits based on this excuse. Is that –

A She was probably offered family leave papers that was according to the contract which she was entitled to. Medical, I don't think that the office would give them her medical paper because by the contract she was supposed to have family leave papers.

Q Okay, we talked yesterday about that provision that

73

the contract."

Correct?

A That's correct.

Q But today you're stating – or yesterday you're stating it was because it was too difficult for you to understand.

A I give it back to her because I wasn't interested. I wouldn't understand it. I believe – didn't I say yesterday that I wouldn't take a medical book or a legal book with documents in it? I wouldn't know what to do with it or how to even go about reading an article out of there.

Q But you never said that in deposition telling me that it was too difficult for you, correct, yes or no? I don't want to belabor this process any longer than we have to Mr. Hendrickson.

A Well, you never asked me that –

Q Well, that's the answer –

A -- if it was too difficult to read. If you asked me that, I would have said, yes, I would.

Q Let me go back to you – if you can refer to the exhibit, your notes. On August 23, 2000 when you wrote your note, you said that, "Robin Scott handed me a book to read that she said would show me that she had the right for medical leave papers. I did not open the book, and I gave it back to her."

A I – Pardon me. What is the question?

Q Nothing further with that.

Now, Robin Scott was a good worker, correct?

A She was a good worker right up until the time when she started getting these different moods. For the first seven years she was an excellent worker. Then at days she come in she was a wonderful worker; other days she wasn't worth – she wasn't too good.

Q You never wrote her up besides the one disciplinary action that we've talked about, you never wrote her up when – that time she somewhat declined after seven years of good performance.

A I had a policy with the girls, I told all the girls, probably even told Robin, I said you girls make a mistake, the company will get fined for it, and I said that's okay. I said, the only person that's going to make a mistake is one of you girls that are working, the only girl that's not going to make a mistake is a girl that does nothing. And I said please come to my office and tell me that you made a mistake, and we'll hash it out among us. And nothing was ever said. And every girl in that department at one time or other, the girls that were working and did things, made mistakes, and we worked it out. And if I got my tail in the wringer over it, or the company got fined, that was fine, because the girl didn't deserve that.

124

BY MS. POLLICK:

Q Do you know when you have to provide pregnant workers who are unable to work sickness and accident benefits?

A All we were – we were told that starting with the contract in 1995, anything would be under the Family Leave Act.

Q Do you know that leave because you're unable to work because of pregnancy is different than maternity? Do you distinguish a difference between those two terms?

A Yes, but I'm telling you what we were told by the president of the company; we couldn't change that.

Q Okay. But according to your Collective Bargaining Agreement if there is law in place that says you have to do something, you follow that law, correct?

A Either follow – if it's something we know, if not, we would take it in and discuss it with Mr. Nolan.

Q Okay. Well, the Collective Bargaining Agreement actually says it will supersede the provision in the Collective –

A I couldn't make that decision without him saying so.

Q Did – what do you understand you have to provide to a pregnant worker, any benefits?

A Under – if it's for maternity, we were told it's

126

Q I had the wrong deposition, that's why I couldn't find it.

Okay. You'd agree with me if you'd turn to page 76 of your deposition –

A Okay.

Q -- you stated that, question – and we were talking about an individual Drew Olecki (phonetic) and you answer, "I believe he was on medical leave in the past; he was pretty sick. It was some years ago."

I questioned, "That would be a paid medical leave?" And you said, answer, "If it was a doctor's excuse, if we had an excuse from the doctor stating that he couldn't work."

A Um-hum.

Q So you needed more than that?

A That would still go through the office, through Mr. Nealon before it was approved.

Q Do you have any documentation that he signs off on approval of it?

A No, not – there was some up at the plant, but I don't know what's up there now, I haven't been up there.

Q Now, Robin Scott provided Eureka with medical documentation stating that she could not work because of chemicals in the plant, correct?

A Uh-hum.

127

Q And you did not honor that excuse in the sense of letting her not work and collect paid medical leave, correct?

A Well, when I received that excuse, probably from Butch, I would take it in to Mr. Nealon, and he would go over it –

Q Okay.

A -- because – let me explain. Right in the beginning when this thing was signed in '95 with the medical leave in there, he told us that anything pertaining to maternity would come under the Family Leave Act. Now, everything that came up at – every excuse that came in, we didn't go back in on that because this is what he said at that point, and until he changes it it would stand in effect.

Q Okay. So you – did you accept the doctor's excuse regarding the chemicals?

A I accepted it as far as taking it in to show it to him.

Q If you can turn to page 50, 50 line 16.

A Hang on a second.

Q And I asked you the question, "I'm not asking you that question, I'm asking you whether you did not accept that excuse. And I believe you testified that you did not accept it, is that right? Answer. Right."

128

A Wait, wait, until I see what it says above it.

All right. It would be right, but it would be that that went in to Mr. Nealon. We discussed it, and that was the answer.

Q Okay. Well, you never told me that during your deposition, correct?

A Well, I may – I wouldn't have said – I would not have explained that because everything is handled in that term – in that manner.

Q Well, let's read down. I asked you the question, then the next question I asked you: "It was based on the contract terms, is that fair?" You say – answered, "Exactly." I gave you a question. "Did you consult with anyone in connection with deciding that it was – that it was to deny that in connection with the terms of the contract?" And you said answer, "No."

A That's right, because we went over this when it was first put in the contract, the family leave. Anything for maternity we were told comes under the family leave.

Q So in connection with not accepting the first doctor's excuse that Robin Scott provided to you, you did not consult anyone in denying that, correct?

A The one on this page?

Q Yes.

A No, I would have taken that – in fact, we were

139

BY MS. POLLICK:

Q Mr. Tully, could you identify for the jury what exactly the document is called?

A This document?

Q Yes.

A It's –

THE COURT: For the record, you're referring to exhibit plaintiff 42, is that correct?

MS. POLLICK: Correct, Your Honor.

THE WITNESS: Leave of absence, request for leave of absence.

BY MS. POLLICK:

Q Is this the form –

A Which –

Q I'm sorry.

A Which they use for – for medical leave.

Q Is this the form you used for a paid medical leave?

A Yes.

Q Now, what is the date of this leave?

A Let's see.

Q Not the date, the date it's signed?

A The date it's signed, 3/14/03.

Q And actually, you signed this document, correct, approving it?

A (Nods head.)

140

Q Could you put –

MR. COGNETTI: You have to give an affirmative response.

THE WITNESS: I'm sorry. Yeah, I signed this document approving it, as I said before, after taking it in for Mr. Nealon to approve it.

BY MS. POLLICK:

Q Okay, well there's no section for Mr. Nealon to sign on it.

A Mr. Nealon didn't sign anywhere on these.

Q He's the president of the company, right?

A That's right.

Q And so you're saying the president actually deals with administrative stuff, and that's why he doesn't – you're director of manufacturing – let me strike that.

A This is – it's not a big company at this point.

Q Okay.

A He – let me explain to you. He's one – he's one of the owners or principal owner. Bob Barrett, who was in the job that I got, he was one of the owners. I got his job after he passed away. Not being an owner, I didn't have the same powers that Mr. Barrett and Mr. Nealon. I was – I did what I was told if I wanted to work.

Q Well, you were – you willingly accepted the position of director of manufacturing, correct?

141

A I was told this is what I was – this is the job I was going into.

Q You could always have walked out if you felt –

A Yes, I could, but at that age where would I go to work if I walked out?

Q Nonetheless, you actually signed this approving it, correct?

A After Mr. Nealon approved it, yes.

Q Okay. And there's no signature of Mr. Nealon.

THE COURT: We've established that. We've been there. Let's move on.

BY MS. POLLICK:

Q And you'd agree with me that under section – the fourth sentence it says, "Leave for personal illness, maternity or injury, authorizes the company to contact my physician concerning my health, correct?" The fourth sentence down.

A Where?

Q Right –

A Oh, fourth, yes. Down here?

Q Yep.

A But these were the forms that they still used before they got the Family Leave Act in the contract.

Q Okay. That's a document dated 2003, right?

A Um-hum.

142

Q When was the change in the contract?

A '95, but evidently these were never changed. It had nothing to do with that.

Q Okay, so they were using it for eight years?

A (Nods head.)

Q I'm going to show you what's been marked as plaintiff's exhibit 40. Now – and this is Andrew, that was the person whose leave was –

A It's Andrew Krishanda.

Q And show you what's been marked as plaintiff's exhibit 40. Have you ever seen that document before?

A Yes, basically the same thing.

Q And the date of it?

A 2/12/03.

Q Okay. And you signed off on it again.

A yes

Q And no Mr. Nealon.

A No Mr. Nealon. No Mr. Nealon signing off on it. He's seen every application – every application that came in for medical leave or any other leave as far as that goes.

Q I'm going to show you what's been marked as plaintiff's exhibit 31, have you ever seen that document before?

A Yes.

A Same as the other two only this is for a different medical condition.

Q And who is this person?

A Pardon me?

Q Who is this person, the employee?

A Robert Mitchell.

Q And why is he out?

A It's something to do with his legs, I think he – something – he had problems with veins in his legs, and they had to strip them out or something.

Q Okay, and what is the date of the document?

A 6/3/02.

Q And you, again, approved this document?

A Yes, the same way I approved the other ones.

Q Now I'm going to show you what's been marked as plaintiff's exhibit 32. If you can look –

MR. COGNETTI: Your Honor, we object pursuant to Rule 403.

THE COURT: To this document or to what?

MR. COGNETTI: Cumulative, Your Honor.

MR. POLISHAN: Yes.

THE COURT: All right. I'll allow this, but I'm not sure that I'll allow – I'll overrule that objection and we'll allow this particular exhibit. Go ahead.

BY MS. POLLICK:

Q If you could turn in the plaintiff's book to plaintiff exhibit 32. Do you know what that is?

A Yes, same as these.

Q Same as the other ones?

A Yeah.

Q And who is that for, what is the employee's name?

A Andy Krishanda, the same.

Q Why was he out?
A Abdominal surgery.
Q And when was the leave approved?
A 5/23/02.
Q And you approved it?
A Same as the other ones, yes.

MS. POLLICK: I would like to publish plaintiff's exhibit 32.

THE COURT: You can publish it without objection. Let's keep moving.

MS. POLLICK: I'm sorry, what did you say, Your Honor?

THE COURT: I said it can be published. It hasn't been objected to. Let's keep moving.

BY MS. POLLICK:

Q Okay, and if you could tell me, if you can go to the approvals, who signed off on the approvals of this medical leave absence? You can look at the book, it's the same exact exhibit.

A Let's see, Butch Hendrickson and myself.
Q Thank You.

Now, if you could just – I'm not going to go through all of them, but if you could go through the exhibits 34 through 44, if you can just look at them and see –

THE COURT: Then the objection is sustained under 403. These are cumulative. We're not going to spend time, unless you can distinguish any one of these. If they stand for the same proposition as the prior exhibits then they previous exhibit is sustained. There's – it is cumulative. If there is a distinguishing factor that stands for a different proposition than the other exhibits, Ms. Pollick, I'll consider it, but I don't think that there is.

MS. POLLICK: Liz, I'm just going to ask you a question

(Question.)

BY MS. POLLICK:

Q I'm going to show you what's been marked as plaintiff's exhibit 26.

MS. POLLICK: This is a different year, Your Honor. It's an earlier year, 2001.

THE COURT: If it's the same proposition, then the objection is – the sustained objection stands. It's not as to year, it's as to the fact that these are cumulative requests for absence forms for different medical conditions for different individuals. The evidence is cumulative. The year is of no moment. That's not a distinguishing factor unless you can tell me why it is, other than it's a different year.

BY MS. POLLICK:

Q Now, in connection with Robin Scott, although you knew you could provide family leave and paid leave at the same time, you chose not to do that.

A Through Mr. Nealon, yes.

Q Now, you were aware that Robin Scott filed grievances for harassment based on the fact she had filed charges with the EEOC, correct?

A Um-hum. Yes.

Q Now, you never conducted any type on investigation surrounding her claims that she was retaliated against, correct?

A No, but Mr. Hendrickson did.

Q Okay. You never did anything.

A No, I went over that with Mr. Nealon, and he said that Butch is going to – Butch will handle the investigation on the charges, harassment charges.

Q How many complaints did she file that you know of?

A I don't remember, I'd have to look.

Q Was it more than five?

A It may have been.

Q Did you have a discussion after each grievance was filed?

A Everything that came in at that point was discussed with Mr. Nealon.

Q And Butch – it was the responsibility of Butch Hendrickson to investigate Robin Scott's grievances in connection with her complaining of retaliation and harassment.

A Yeah, which he did.

Q Do you have – were you there when he interviewed any witnessed?

A No, but he had told me, and I have no – no reason to believe that he lied about it.

Q Did you – did he ever give you a written report saying this is who I interviewed, this is what I collected? Did you ever have a company wide meeting to say there is no harassment at Eureka?

A Did I call a meeting?

Q Yes.

A No.

Q Did Butch Hendrickson?

A No, neither one of us was able to do that.

answer. He's nodding his head in agreement, and there is no verbal response for the record.

THE COURT: All right. Mr. Tully, you have to verbalize your answers.

THE WITNESS: I'm sorry.

THE COURT: Because the stenographer can't pick up –

THE WITNESS: I'm sorry.

THE COURT: -- shakes of your head. So you have to say something so that she can pick it up.

THE WITNESS: Sorry. What was it now?

BY MS. POLLICK:

Q And pursuant to that harassment policy you go to your supervisor if you have a problem, correct?

A Correct.

Q You don't need a union grievance to get a situation addressed, correct?

A Correct.

MS. POLLICK: Nothing further.

THE COURT: All right. Counsel, do you want to reserve you –

MR. COGNETTI: I will, Your Honor.

THE COURT: Mr. Polishan?

MR. POLISHAN: And, Your Honor, if I can reserve in a similar fashion as Mr. Cognetti did.

A No.

Q Were you ever interviewed in connection with any type of complaint of harassment of Robin Scott?

A No.

Q Were you – and that would be by Butch Hendrickson, were you ever talked to?

A No.

Q Were you ever interviewed by Ron Tully in connection –

A No, I was never interviewed by anyone about anything.

Q How often did you work in 2001.

A 2001?

Q Yes.

A I worked at Looney's market in 2001. How often did I work?

MR. COGNETTI: Your Honor, I think – Ms. Pollick, she started in 2002. You're asking her about 2001.

THE WITNESS: You said 2001.

MS. POLLICK: I apologize.

THE WITNESS: You did say 2001, okay, I was like –

MS. POLLICK: I did, I apologize.

BY MS. POLLICK:

Q In 2002, how often did you work?

A Well, I didn't start until the middle of August. I

159

at this point. We'll return to take up the matters as we discussed at sidebar.

THE DEPUTY CLERK: All rise.

(Whereupon, a recess was taken from 1:53 p.m. to 2:16 p.m.)

(Jury not present.)

THE COURT: All right. Counsel, pursuant to what we discussed previously, let's take your Rule 50 motions, and we'll take them in this order. I think this is the easiest way to do it. Let's go first with respect to – in no particular order, perhaps this is the order that they're in the complaint, I'm not sure. The gender pregnancy act discrimination claim under Title VII, let's go first to that, and I'll hear counsel on that.

No, it's your motion.

MR. POLISHAN: I'm sorry?

MS. POLLICK: I have a Rule 50 motion myself just on the – the fact of the paid medical leave, that is there is no issue that needs to be resolved because of the fact that pursuant to the law they had to give her paid medical leave. I don't think it's an issue for the jury to decide. I think the law is clear.

THE COURT: I don't think it is. That motion is denied. I'll hear your motion.

MR. POLISHAN: Seeking a directed verdict in favor

160

of the defendants as a matter of law under Rule 50, all evidence viewed in the light most favorable to the plaintiff, we've got testimony from the plaintiff, Judge, that constitutes proof that the paid maternity leave request was denied. But all of the other direct evidence submitted by the plaintiff shows reasons why there was a legitimate business decision-making process and decision that was made.

THE COURT: All right. Let me ask you this question – let me ask you this question, and I'm going to hear from Ms. Pollick on these points as well, obviously.

My understanding of the claim is that we've got a Title VII violation alleged, predicated on a violation of the Pregnancy Discrimination Act. Now, who does the Pregnancy Discrimination Act cover? Who is it intended to cover? Who benefits? Who is the protected class?

MR. POLISHAN: Women.

THE COURT: Who are?

MR. POLISHAN: Who are pregnant.

THE COURT: Do you have to be pregnant to be covered by the Act? It seems to me you do. All right. Now, on these facts, this is what I see. I see that the plaintiff, at a point in time in August, began to talk to her employer about a paid leave for pregnancy, and that then escalated in September into a series of excuses that she got, each of those from doctors, or letters, and each of

those letters and excuses to the best of my recollection indicated that she wanted a leave for six weeks through her delivery date, and for an appropriate time after she delivered the baby, understanding that I think her due date, if I recall correctly, was around September 25th.

Now, is the plaintiff covered by the Pregnancy Discrimination Act after she delivers the baby?

MR. POLISHAN: We submit that she's not.

THE COURT: All right. So when is the operative period? Is it up to the point where she delivers?

MR. POLISHAN: Yes.

THE COURT: All right. All right, I want to hear Ms. Pollick.

Ms. Pollick, your argument, as I understand it, is that the Pregnancy Discrimination Act, overlaid on top of the CBA, mandates that the plaintiff get paid leave subsequent to the time that she delivers this baby. Is that your argument?

MS. POLLICK: If she's unable to work because of pregnancy-related complications.

THE COURT: That would mean in every event, every single person who works for an employer would get paid maternity leave.

MS. POLLICK: I disagree with you. Most – usually the maternity leave under the FMLA is that you can have 12 weeks to spend with your baby. There may be a point during that time that they are unable to work, but I know a lot of people that go in and out of the hospital, have their baby and are back to work in a day.

THE COURT: Well, you may miss another point. Why does the – how does the Pregnancy Discrimination Act protect the plaintiff after she delivers the baby?

MS. POLLICK: Well, it's an extension of the Gender Discrimination Act, Your Honor, I think it's an amendment to Title VII.

THE COURT: Well, it is. We can agree it's an amendment to Title VII, but the case law uniformly says that the Pregnancy Discrimination Act covers people who are pregnant. It doesn't cover people who aren't pregnant.

MS. POLLICK: Well, she requested leave when she was pregnant, Your Honor.

THE COURT: Clearly, clearly. So isn't the operative period from the day that she requested leave up until the date when she delivers the baby?

MS. POLLICK: I think is she's having – if for whatever reason her pregnancy is the resulting cause of her unable to work, then I think that she would be covered.

THE COURT: I don't believe that that's the case. It looks to me like the Pregnancy Discrimination Act – let

163

me change the facts. It seems clear to me that if in mid pregnancy, let's just change the facts hypothetically, if it was the third or fourth month and she had received something from her physician that said that she was completely unable to work, that the baby was in jeopardy, that she had to be bedfast, and if she had requested medical leave at that point in time for a pregnancy-related complication, and if the employer refused to give that, then I think you have an employer who could be – who could run afoul of the Pregnancy Discrimination Act. That's not what we have.

These notes establish to my mind that what the plaintiff requested, and by her own testimony incidentally, it establishes that the plaintiff thought not that she was entitled to coverage up until the date that she delivered the baby – and you seem to agree with what the plaintiff's cause of action is – but that she thought she was entitled to paid pregnancy leave because of the Pregnancy Discrimination Act. I don't believe she was.

I believe that, at best, she was entitled to some coverage up until the day that she – that she was entitled and she was covered under the law until the date she delivered the baby.

Now, if she had requested a leave from the time that she handed the slip in until the time that she delivered the baby, because of a pregnancy complication,

164

then I think the employer might be liable to provide that if she had appropriate documentation. But that's not what she requested. She requested a paid pregnancy leave for six weeks extending past the time of the note or past the point of delivery.

I don't think that's in any way a denial of that. I don't think in any way that that's a violation of the Pregnancy Discrimination Act. In other words, the employer responded to what it had. What it had appeared to be a request for maternity leave.

MS. POLLICK: Well, let me ask you this, Your Honor. If you get – if you have an abdominal surgery that you get covered by that, a pregnancy you have a C-section, you need time to recover, that is related to pregnancy, it's not related –

THE COURT: So are you saying that any employer in the United States who has a – an employee go out on pregnancy leave, let's say it's a C-section, that that means that they're entitled to paid leave?

MS. POLLICK: They're only entitled to what everybody else is entitled, Your Honor. She's not asking for more benefits. She's saying –

THE COURT: You're not answering my question.

MS. POLLICK: Yes.

THE COURT: Everybody is entitled to a sick day, we can agree on that. Every employer permits employees to have sick days.

MS. POLLICK: I disagree with you.

THE COURT: Well –

MS. POLLICK: I know a lot of employers that don't offer paid disability leave.

THE COURT: Well, we know this employer provided paid disability leave, there is no question about that, no question whatsoever that that's the case.

However, in this particular case, you're undergirding you action with a violation, you have to go back, you're undergirding your claim with a violation of the

Pregnancy Discrimination Act. In order to find the employer liable, you have to find that the Pregnancy Discrimination Act extends past the point of delivery.

MS. POLLICK: Why do you have to do that, Your Honor? I don't see –

THE COURT: Because you have to be pregnant to be covered by the Act.

MS. POLLICK: I know, but like if you hand in an excuse and you're pregnant and you're unable to work, I instantly should get benefits, whether you say I can't take it for the whole 12 weeks because I'm really not unable to work is a different story.

THE COURT: All right. Stay with that line for a second. Now, first of all, that's not what you've asked for.

MS. POLLICK: Well, I don't think that's the case but you're – I'm saying if I follow your logic.

THE COURT: Let's go back – and before we consider your fact situation I want to talk about that.

Do you believe that the plaintiff was covered by the Pregnancy Discrimination Act after the moment that she delivered her baby?

MS. POLLICK: Absolutely, because she has a C-section.

THE COURT: So you think the fact that she had a C-section, despite the fact that she's without child after she delivers, keeps her covered under the Pregnancy Discrimination Act?

MS. POLLICK: I believe it does. It's related to her pregnancy, the whole Act is for pregnant people.

THE COURT: She's not pregnant when she delivers.

MS. POLLICK: Well, this sounds like a fetus argument to me, like that's what it sounds like, when is a child a child, but –

THE COURT: No, no, no, no, Ms. Pollick, that's not my argument at all, and that is a mischaracterization of my argument.

My argument is simply that every case that I've read – and don't drag me into that analysis, that's not at all what I'm saying. What I'm saying is that the Pregnancy Discrimination Act on its face, and by every case that I've read, covers women who are pregnant.

The legislative rationale obviously was that during the time of pregnancy a woman couldn't be treated differently than others outside of that protected class. And we can all agree that under the circumstances, as I said, if the plaintiff had shown that she was ill, and let's go back to what you said a moment ago, if – if the plaintiff had requested on September 11th, that she be given leave until the date that he delivered the child because she was physically unable to work and that she was ill and that she had complications, I think under those circumstances colorably the employer may have had an obligation under the Pregnancy Discrimination Act to give her the same benefit, that is paid leave, that it gave other people who were unable to work because of an illness.

But the problem I'm having with this case is that that's not what she asked for. What she asked for and what she clearly testified that she believes that she's entitled to is a pregnancy leave for six weeks extending past the point of her delivery.

You say that the Pregnancy Discrimination Act, because she had a C-section which you equate differently from a natural birth, that somehow that that elevates her rights to paid leave. I don't see that anywhere.

MS. POLLICK: Okay. Your Honor, this is my take on it. She was in a protected class when she exercised her rights. She was unable to work. Instantly at that point she becomes protected, and she should get the same rights that anyone else who says – who brings a note to the – to work and says, oh, you're off for six weeks.

THE COURT: Does it matter that's not what she asked for?

MS. POLLICK: She asked for leave – the first –

THE COURT: She asked for six weeks of leave.

MS. POLLICK: The first excuse she asked – there was no date on it, I don't think.

THE COURT: Well, let's look at the exhibits.

MS. POLLICK: There was one, two and –

THE COURT: The last operative letter that you have –

MS. POLLICK: Number one, which is plaintiff's exhibit 2 –

THE COURT: Well, now wait. The last letter that the employer had was on September 13th.

MS. POLLICK: Well, Your Honor, I don't think –

THE COURT: And that says Robin Scott is completely unable to work beginning September 11, 2000, until six weeks

after her delivery. It's bereft of anything in the way of the medical data.

Now even if you read that in concert with the earlier letter that says recommended, which is the letter of the same date, it says that she's under care for pregnancy, the estimated date of her delivery is 25 of September 2000, she's been experiencing back pain and edema of her extremities, and I recommend that beginning September 11th she stop working completely until approximately six weeks after she has delivered.

Now, if that letter had said – and this is what I'm grappling with – if the letter had said that she is to go out and cannot work because she's having complications and she's requesting medical leave, then I think if that had been refused on its face, that may create discrimination.

But any reasonable employer, it seems to me, faced with this would say, this woman is asking for paid pregnancy leave. They responded by giving her the forms to fill out for Family Medical Leave Act

Now, she grieved that. She said I don't believe that that's correct. I think that the CBA allows something different, and quite frankly on the evidence that I heard, it looks to me as if the plaintiff thought that she was entitled to paid pregnancy leave because her aunt got it under a different CBA approximately seven years before this happened, and then it was stuck in the plaintiff's head that apparently she was entitled to that. It had nothing do with the Pregnancy Discrimination Act.

So here is what we're going to do –

MS. POLLICK: Can I reply, Your Honor?

THE COURT: You can, but we're going to move on.

MS. POLLICK: Okay, thank you.

THE COURT: Because I'm going to give you an opportunity to look at this further if you want, but go ahead.

MS. POLLICK: Your Honor, I would like to point out for the Court that plaintiff's exhibit 2, which is the first excuse that was ever given to Eureka and had

Eureka accepted this we would not be looking at the later excuses. The first excuse she ever gets and hands in is dated 9/7/2000, and it says, The above patient will be temporarily unable to work due to the chemicals in the plant. Patient needs to stay off her feet.

THE COURT: And look what the dates say, Ms. Pollick, the dates say 9/11/2000 until 10/22 –

MS. POLLICK: She's been under my care.

THE COURT: -- 2000.

Well that couldn't be. That date hadn't happened yet.

MS. POLLICK: Well, I don't know why the doctor put that –

THE COURT: Well, I have a feeling I know, and I have a feeling because that's six weeks. Let's call it what it is. And it also contains the words, patient will be out on maternity leave. Now, how would a reasonable employer read that, as a request for maternity leave, that's what it says.

And the rest of it has – let me finish. The rest of it has to do with chemicals, and there's been a lot of discourse about chemicals. You didn't present any evidence that anybody requesting a work accommodation was treated any differently. We heard testimony on that, but I don't find that the employer's efforts, while you may disagree with them and while you may say that the plant was rife with chemicals, there's no indication that it was discriminatory for them to try and find a place for her to work under those circumstances. She simply kept going back to the well.

What it looks like to me is, the plaintiff kept continuously going back in an attempt to find the key that would unlock the door that would get her out of there so she could start her maternity leave through repetitive excuses.

MS. POLLICK: I disagree with you, Your Honor. I think that there's an issue of fact because of the fact that she was going to work until – she couldn't stop working, and she testified to that, so that's not –

THE COURT: She what?

MS. POLLICK: She testified that she was going to work until she wouldn't work any more, not that she was going back to the well.

THE COURT: How does that help?

MS. POLLICK: Your Honor, I think the instant she turned in P-2, the employer had an obligation to give her unpaid – I mean paid leave.

THE COURT: Until when?

MS. POLLICK: Just like anybody else.

THE COURT: Until when?

MS. POLLICK: Until whenever she was able to work again, just like everybody –

THE COURT: So you believe – see this is where we have a fundamental difference, and this is what I'm going to give you an opportunity to look at, and I will too. If my supposition is correct, and if the Pregnancy Discrimination Act doesn't cover her once she delivers a baby, that I think your argument fails. So we're going to leave this area and we're going to move on to the next area. I'll withhold ruling on that part of it. I want to look at it further, but I think your supposition, which is that a C-section on the 17th of September converts her post pregnancy into someone covered by the Pregnancy Discrimination Act, I don't believe that that's correct.

All right. Next area? The next area –

MS. POLLICK: Your Honor, can I point out one thing? I did submit evidence into record that the employer accepted a medical excuse, plaintiff's exhibit 35, and that excuse states that he's going to have cardiac problems, leave extends from 12/16/02 to 1/13/03. So the employer has accepted those types of excuses as proper under their paid leave. So why should she be treated any differently than the male?

THE COURT: Because the operative words that were used in the submissions involve maternity leave. They don't involve – and read the cases on the Pregnancy Discrimination Act, and they differentiate completely between normal maternity leave and illness or complications that are pregnancy related, that's why. This was an illness separate and apart.

Your argument – your argument – and I don't know how else to express this other than what I've said three or four times now, assumes that any woman working for an employer in the United States, if that employer offers sick days off, that if that woman goes off – goes out of work on a C-section, that she's entitled to paid pregnancy leave. That's your argument.

MS. POLLICK: If she, before she even has the birth, she goes out absolutely.

THE COURT: That she's entitle –

MS. POLLICK: If she goes out – before she gives birth, she's still pregnant, she goes out, she has a C-section, I don't think that takes her out of the Act. But I don't think my argument is not saying that because the excuse is – runs into the future, that somehow that disqualifies her for paid leave.

THE COURT: The pregnant – no, I'm saying that she's covered as long as she's pregnant.

MS. POLLICK: So you mean you're telling me that a pregnant woman, the – the only way you're ever going to get coverage under the Act and get the same benefits is if you say I am unable to work until further notice, then you get coverage. Is that right?

THE COURT: The first thing that we disagree on is you say that the Act extends beyond past the point of delivery. The second things we disagree on is what she requested. She didn't request that, and I think it's important on the issue of discrimination and what a reasonable jury would decide under Rule 50, to know what the employer was responding to. The employer can only respond to what it had. What was requested here was paid maternity leave. Now you can't call it anything different than that. I mean, you're imposing on the employer a duty to say, okay, we see what you're requesting, it's paid maternity leave, but what we're going to do is we're going to parse out of that some entitlement to sick leave up to the point where the baby is delivered. I don't think an employer has that responsibility, and even if they do, I can't find that to be discriminatory.

I need to move on because we're going to run out of time. Let's go to the next area, which is – well let's take hostile work environment next. Go ahead.

MR. POLISHAN: Your Honor, in the review of the evidence on our Rule 50 motion, on that part of the case, the evidence submitted by the plaintiff from the witnesses Neff, Taramelli, Kwolek and Carpenter do not support at all the factual basis for a hostile work environment, even as posed by the plaintiff.

The plaintiff's version of those acts which constitute a hostile work environment are similar to those things also testified by the witness Rumford. But all of the predicates and constituent parts of the events that were supposedly hostile are work squabbles. They are not gender related, they're not gender motivated, and in fact, Rumford experienced this similar treatment, according to her testimony, before, during and after there was ever a discrimination charge filed by Robin Scott, and in fact Rumford never filed one herself, so she wasn't being retaliated against.

THE COURT: Let's hear from Ms. Pollick.

MS. POLLICK: Your Honor, Rumford testified to the fact that it – when I asked her about how was the environment once Robin filed charges of discrimination, she said it escalated.

THE COURT: Let me ask you this. For a hostile work environment, doesn't hostile work environment have to be – isn't the first touchstone that she suffered intentional discrimination because of her sex?

MS. POLLICK: It's based on harassment, based on retaliation. It's retaliatory.

THE COURT: No, well now don't conflate the two. You have a retaliatory claim, and we're going to discuss that. This is a standalone hostile work environment claim that you pled. In my reading of the cases says in the first instance, these are the tests as I know them to be or these are the areas of proof. First, that she suffered intentional discrimination because of her sex; second, that the discrimination was pervasive and regular; third, the discrimination detrimentally affected the plaintiff; fourth, the discrimination would detrimentally affect a reasonable person of the same sex in that position; and next and last, liability on the part of Eureka to get to the aiding and abetting, obviously, which is next.

177

Now, how do you get around the first?

MS. POLLICK: Your Honor, I am not pursuing this based on gender, I am pursuing it based on the protected activity was retaliation, and it was -

THE COURT: Then – well, then there is no hostile work environment claim.

MS. POLLICK: Well, I would disagree with you. I believe the hostile work environment is based on –

THE COURT: No, hostile work environment is a distinct cause of action. If you want to say that she was retaliated against, that is a distinct claim, and we're going to argue that in a second. Now, we clarified what your causes of action were before we started this case. One of them you said was a hostile work environment. In fact, you've used that word or phrase throughout this trial.

Now, I don't know if you want to use it – I don't know how you exactly use it in the context of retaliation, but that's for you to determine. But you pled a hostile work environment claim.

MS. POLLICK: Correct, and I believe it's based on the retaliatory – the filing of charges. You're telling me that there is no cause of action based on that. And –

THE COURT: The retaliation, the retaliation itself that you've alleged has to involve an adverse employment action. Now, you may – you may say that her supervisors, for example, did something to her as a result of her filing, and did that constitute an adverse employment action. Now, that's not hostile work environment. You're conflating the two causes of action in my mind. They're two different things.

So if you can't – if you can't argue that she suffered intentional discrimination based on her sex, then there is no standalone hostile work environment. I don't know how you want to argue it as far as retaliation. It's quite clear to me that we had a work area that was filled with women, that there was certainly interplay between the women that may have been at times hostile and difficult, but they're all the same sex. You don't – I don't have any discrimination that was based on sex.

MS. POLLICK: Again, You Honor, I never pursued hostile –

THE COURT: You pled that.

MS. POLLICK: You're saying there is no cause of action for the way that I'm viewing the hostile work environment claim, which could be based on retaliation, it was hostile because of the –

THE COURT: Hostile work environment is not based on retaliation. Hostile work environment is exactly as I've expressed it. All right. The hostile work environment claim as a standalone claim is dismissed. Let's move to – it will not go to the jury as a standalone claim.

The next area is and the last area is the claim for retaliation. All right. Mr. Polishan.

MR. POLISHAN: Thank you, Your Honor. I suppose the adverse actions alleged by the plaintiff include layoffs. The evidence on layoffs, that they were common for everyone before, during and after any discrimination complaint was ever made. The processes and the reasons why the layoffs occurred have been confirmed by the witnesses to be legitimate, and there's no pretext evidence.

THE COURT: Well, for the retaliation we, I think, can probably agree that she engaged in an activity or activities protected by Title VII, right?

MR. POLISHAN: By filing of the PHRC and the EEOC claims.

THE COURT: It seems to me, and a lawsuit.

MR POLISHAN: And the lawsuit.

THE COURT: Now, the next point is that the employer too adverse employment action against her. Now, you say that the employer did not. Isn't that a jury question? She claims layoffs, she claims, you know, other things that took place as a result of filing the – filing the, in the first instance, the PHRC action.

MS. POLLICK: Okay, so are you saying if you take the fact that you don't believe she was protected?

THE COURT: Yes.

MS. POLLICK: No, because when she exercised her rights she was protected, she was pregnant, she didn't have the baby.

THE COURT: All right. All right. And you also contend, I think, that the adverse employment action constituted layoffs when others similarly situated were not laid off.

MS. POLLICK: Correct, and then also she – she lost pension contributions, she lost vacation accruement, she – let me see what else she – oh, continued harassment can be sufficient to take the retaliatory causal connection; and the harassment continued up until the point she has to leave.

THE COURT: All right. Well, I think under the circumstances, and I'll reserve ruling on the retaliation claim, a I said that I would. And the reason that I ruled on the hostile work environment claim is because I consider that claim to be abandoned because, by Ms. Pollick's answers it's clear that, to the extent, and I'm not sure, I still don't understand how hostile work environment fits within retaliation, but Ms. Pollick's comments imply that that's subsumed within her retaliation claim and is not a

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A Well, she related that there were major difficulties with the place that she had worked in, and she related some incidents that started I believe in 2000 and were ongoing. You know, they were affecting her family; they were affected different areas of her life.

Q Can you go into any more detail?

A As far as the –

Q What actually was occurring that she was telling you about?

A Well, currently what was occurring when she presented to us is that she felt that she was under tremendous stress at work because of people – I don't – they weren't talking to her, they were saying nasty things to her, she felt she was being targeted at work.

Q Now, how often did you see her?

A Without having the record in front of me, I'm going to guess, my typical record was every two weeks.

Q What were you treating her for?

A Major depression.

Q Now, can you highlight for the jury what she told you during visits that she had with you? What stands out in your mind?

A Right, 90 percent of what she had talked about –

MR. COGNETTI: Your Honor, asked and answered.

THE COURT: Sustained.

BY MS. POLLICK:

Q What did Robin Scott tell you? Did she tell you anything about prior – going to a psychiatrist at all or psychologist?

A No. She – it's my understanding we were the first treatment that she had had.

Q Did you – what did you inquire as to her history?

A Whether or not – well, when you're doing a diagnosis, you look at whether anybody had ever had former treatment or suffered from any of the symptoms, you look at family history, those kinds of things, and she said she had none of those prior to about 2000.

Q Now, did she – what other information did you gather from her?

A Well, she would relate mainly the storied about work and the things that had happened. There was an incident when she was pregnant that there was a major – was a major stress for her, and she was carrying a lot of guilt because she felt that she was forced to go back to work, and then her baby was born in distress, and she thought that the distress was created by the work situation, and that – that she had continued to work despite the doctor's orders.

Q Now, did you conclude what actually caused Robin Scott's emotional problems?

MR. POLISHAN: Objection. what we talked about at

233

sufficient to withstand the Rule 50 motion at this time. I will hear renewal of Rule 50 motion on retaliation at the conclusion of defendant's case.

You certainly can reiterate that motion, and I'll certainly hear argument from the plaintiff in the event you do that. I simply don't have enough at this point to rule at the conclusion of plaintiff's case that the retaliation claims fails.

I have already ruled on the hostile work environment. That claim has failed and will not go to the jury under any circumstances. All right.

MR. COGNETTI: Thank you, Your Honor.

THE COURT: That concludes our week. I'll see you Monday.

THE DEPUTY CLERK: All rise.

(3:47 p.m., court adjourned.)

4

(8:39 a.m., convene; jury not present.)

THE COURT: Good morning to counsel. We are back on the record outside the presences of the jury. And over the weekend the parties filed, and I read this morning, supplementations that went to some of the issues that we discussed pursuant to the defendant's Rule 50 motions. And I'll hear any additional argument that either counsel – any counsel wants to make, but I've thoroughly read the submissions, I'm prepared to rule. But if you want to augment these submissions, I'll here you. If it's simply to reiterate what's in the submissions, it's unnecessary to argue further.

Let me go to defendant's counsel first.

MR. POLISHAN: Your Honor, I don't need to reiterate my own argument. One brief point with regard to what the plaintiff's filed. It's our position that there's no medical evidence presented that creates a nexus – approximate nexus to pregnancy in this case in that we agree with Your Honor's analysis from Friday regarding the protected class.

THE COURT: All right. Ms. Pollick:

MS. POLLICK: Your Honor, I'm not going to reiterate my argument, but I would like to know, I did not see what was submitted by defense counsel. I'm assuming they filed it after eight o'clock last night when I checked the – my filings. So I have not had an opportunity to see whatever they filed late last night. I just want to state that for the record, I don't know what it is.

THE COURT: Well, you wouldn't necessarily have a right to respond to it in writing in any event, and I didn't ask for written briefs from anybody. I appreciate that you filed them, and certainly there's nothing to prohibit you from filing them, but you can certainly – you're free to review it, but I'm prepared to rule.

All right. Having reviewed the submissions of the parties, having thoroughly looked at the questions involved and the law as it applies, having heard all the testimony in this case on the issue of what we've characterized as the first claim asserted by the plaintiff, that is gender discrimination, and in particular violation in this case of the Pregnancy Discrimination Act. It is clear to the Court that given the argument made by plaintiff's counsel and the facts as presented during plaintiff's case, that the plaintiff harbored a belief at all relevant times that she was entitled to paid maternity leave from the defendant employer, Eureka; that that belief was erroneous, that is not provided for under the CBA; and that her requests, starting with her request that went to chemicals in the – on the employer's premises, that those requests clearly attempted to activate what the plaintiff thought was a right that she had, which was a paid maternity leave. And notably on the – on the 7th of September, there was a statement made by plaintiff's physician wherein it was indicated that the patient would be out on maternity leave subsequent to that. And I'm not sure that that's necessarily an issue in any event because it really sought an accommodation, and there's no testimony that that was dealt with in any way that was discriminatory to the plaintiff.

Subsequent to that there were two letters on the 13th of September. Within the first letter on that day the plaintiff seeks to stop working completely until six weeks after her pregnancy. It's again quite clear that what the plaintiff was attempting to do was to activate a right that she believed that she had, and in fact that she grieved through her union and that it was found that she did not have, which was paid maternity leave.

If the facts of that case were different, and if the plaintiff had asserted that she has a medical reason that she could not work, that is a complication that was pregnancy related, and it was for a defined period of time, it is possible that she would have her foot in the door on a discrimination claim, but that's not what happened in this case. The cases that deal with pregnancy discrimination clearly differentiate from pregnancy itself and medical reasons, and the purpose in the main of the Pregnancy Discrimination Act is so that the plaintiff in this case is treated as if she is not in fact pregnant and the same as any other nonpregnant employee.

I think that she was treated the same for all purposes, and the employer, Eureka, in this case, did nothing more than reply to an erroneous assumption that the plaintiff had, which was that she felt that she was entitled to paid maternity leave. There was no discriminatory animus. There was no violation of the Pregnancy Discrimination Act under the circumstance.

A reasonable jury could never find that the Pregnancy Discrimination Act was violated by the defendants in this case, and moreover, I think that the testimony is clear, there's an overlay here, that a reasonable jury could never find aiding and abetting under these circumstances. So ever assuming for the sake of argument that the first hurdle was overcome, the second hurdle would never be overcome in the case of each of the individual defendants.

So I will grant Rule 50 motion as it applies to the gender pregnancy claim, and in so doing, I will note two other – one is related directly to other areas.

Number one is, for the purpose of any retaliation claim that survives, it is now impossible for the plaintiff to use as a measure of retaliation, that the – that the defendant – that Eureka utilized her attempt to activate paid maternity leave to which she was not entitled as a measure of retaliation. By my account and belief, the measures of retaliation involve the worker's compensation claim and the – and the layoffs that took place. And I understand the defendants' arguments with respect to the layoffs, but those are factual disputes.

But to implicate the Pregnancy Discrimination Act as it goes to retaliation is inappropriate, and I'm ruling that that is not a retaliatory act.

Furthermore, and we discoursed about this on Friday, I still am at somewhat of a loss to understand exactly what the plaintiff argues as it relates to hostile work environment inasmuch as it appeared that plaintiff abandoned her standalone claim for hostile work environment.

As a matter of law it does not appear to me that hostile work environment, which is a term of art in the standalone claim, can be used in aid of a retaliation claim.

Moreover, as a matter of fact, and I didn't mention this on Friday and I should have, the last three fact witnesses presented by the plaintiff in her case in chief directly refuted the plaintiff's testimony with respect to her hostile work environment claim, and in fact, testified in a way that I thought was candid and indicated that there was no substantial harassment in answer to plaintiff's counsel's own questions of the plaintiff at the workplace, at Eureka, during the relevant time periods of which they spoke.

So both as a matter of law and as a matter of fact in aid of any retaliation claim, the concept of a hostile work environment is not relevant any longer in this case and is – would be inappropriately placed before the jury by further questions from counsel.

I think the retaliation claim is tenuous, but I'll allow the defendants' counsel to renew any argument they have with respect to the retaliation claim after the close of their case in chief, as I must, and I'll hear any argument at that time, but I'm satisfied with respect to the retaliation claim that there is sufficient evidence to go forward at this point and to hear the defendant's case.

All right, what other issues do we have before we can start?

MS. POLLICK: Can I just raise one point in connection with your order – your ruling?

I did not realize you were going to revisit the hostile work environment issue. I though it was going to be on the first claim of pregnancy. But as to hostile work environment, I do submit that it's based on the fact that she was pregnant. Not – it doesn't have to be because she's a woman. I know she worked with all women, but the fact that she was pregnant, which is different than the other women, so there is a difference there. The anti-Christ comments, the screaming and yelling, the only reason why all that happened is because she was pregnant, which would put her in a protected class and enable her to maintain a hostile work environment claim.

And secondly about –

THE COURT: No, no, no. The facts in this case directly refute hostile work environment. And she was not pregnant after September 17th, so your testimony as it involved hostile work environment involved acts that – happened in the main after the 17th of September. There was very little testimony, and in fact the main thrust of your case seemed to be that this all started in or about September 2000. She was pregnant 17 days into September of 2000.

Moreover, as I said, as a matter of fact, your proof failed. Your last three witnesses somewhat astonishingly said there wasn't any substantial harassment.

MS. POLLICK: They did not witness any, that doesn't mean it didn't occur –

THE COURT: No.

MS. POLLICK: -- and I just want to put for the record –

THE COURT: No, it's – they were on the work floor. They were coworkers.

MS. POLLICK: The one testified –

THE COURT: Let me finish. They answered candidly, I thought. No, the claim has been ruled on. I'm not going to revisit my ruling. That claim – that claim is out as of Friday.

I mentioned hostile work environment only as it weaves into a retaliation claim. No, the hostile work environment claim has already been ruled upon.

MS. POLLICK: I just want to state for the record that – the fact that I did provide a case that showed

– the Soliba (phonetic) case, in which the Court allowed a pregnancy discrimination to go forward when the plaintiff was terminated at the time of her terminated – termination it was two months after she had given birth, so she was in the protected class at that point.

THE COURT: I agree with that point, and on the question that I posed on Friday, which is whether or not the Act could transcend the moment of delivery, the answer is clearly yes, and you're correct about that. That doesn't change my analysis though because the – the most salient and significant fact here is that your client sought a right to which I find she was not entitled.

And she placed a request in front of the employer that the employer answered in good faith. You may disagree with that, I'm sure you do, but the employer answered the request that it had, which was a request for paid maternity leave. It was not a request that attempted to activate her medical leave under the CBA for reasons that were typically obtained in that case; it was something entirely different.

I'm not going to stay in this area and belabor it, I've ruled.

Next.

MR. COGNETTI: Yes, Your Honor. Responding to the Court's comment, I'm a bit confused, which is not unusual, but, Your Honor, the retaliation claim, as I understood it, was the layoffs, the camera, and the press job, the denial. There's three elements of retaliation or – the workmen's comp, I didn't see that in this case yet.

THE COURT: Well, it certainly expressed that she filed for a worker's compensation. Do you disagree that that would be a right, the exercise of which would trigger the protection of the PHRC?

MR. COGNETTI: I believe that she has that right, Your Honor, and there's no retaliation, just the fact that the insurance company questioned that. It's not an adverse ruling.

THE COURT: I'm erring on the side that is more favorable to the plaintiff for the purpose of the Rule 50

14

MR. POLISHAN: And I don't expect you to.

THE COURT: I think that exhaustion, I'll restate it, is a loose concept, ill-defined, and I'm just not comfortable depriving the plaintiff of the ability to go forward with the remaining claim based on a jurisdictional bar, given how loose the cases are on exhaustion, there's just no bright line.

MR. POLISHAN: Thank you, Your Honor.

THE COURT: Now, do we have any other issues before we get started?

MS. POLLICK: Yes, Your Honor. And first for the record, I just want to state that the adverse actions that we're seeking, she, number one, was laid off after she was released to work; number two, a fail to call during that time period, she was actually disciplined, she – they – the employer – well, the defendant fought her worker's compensation and unemployment compensation benefits; the camera; and the job; and then also treatment in connection with that, collectively.

THE COURT: Well, the treatment issue is the hostile work environment, and that's out. And I'm not going to allow – and I think that is potentially prejudicial under those circumstances, and I've ruled on hostile work environment. You, I think, conflate in this case hostile work environment with the elements or retaliation, and we're

80

Q Could you explain to me why the company was able to have Robin Scott do light duty work not lifting more that five pounds before she gave birth, and then after she gave birth when she's –

MR. COGNETTI: Your Honor, outside the scope. I object to this.

MS. POLLICK: I don't think so, Your Honor, they've asked if she –

THE COURT: Let's finish the question. Finish the question.

BY MS. POLLICK:

Q Do you know why in October – excuse me – in September 2000, why Robin Scott was able to – was given light duty work that she wasn't able to lift more than five, but when she came back after giving birth and she could do more with the restrictions from the Work Med was only less than 50, do you have any knowledge why there was not a job made available in October?

A I have –

THE COURT: Now wait, now wait. Counsel, does this relate to the worker's compensation?

MS. POLLICK: Retaliation, Your Honor.

THE COURT: No, no. The objection is sustained. That's not the answer.

210

THE COURT: Well, let me ask you this on that point. At best I can discern, it appears to me that what we're left with – and I'm going to ask both sides to weigh in on this – is the plaintiff's claim that she filed a – she filed complaints of discrimination, both with the EEOC and the PHRC, and in fact a lawsuit later, and that she filed a worker's compensation claim, and that those are the two protected activities that are left having ruled out the pregnancy discrimination claim; and that in retaliation, what we have left for those protected acts, the plaintiff claims that the defendant failed to interview her for the jet press position, that the defendant – that the employer, Eureka, failed to interview her for the jet press position, pointed a video camera at her, and mishandles her involuntary and voluntary layoffs and call backs.

Ms. Pollick, is that – is that you case at this point?

MS. POLLICK: Well, although you ruled out the pregnancy discrimination claim, it's my understanding that if she had a good faith belief that it was a violation, then that is a protected act under – for retaliation.

THE COURT: And I find that she does not, so – and I've ruled in that regard. I believe that as a matter of fact and as a matter of law she did not have any good faith basis to rely on that, so if I factor that out, is what's actionable under the PHRA. Unless, Ms. Scott, you can convince me that it is actionable, and I stand corrected in that regard, then that's got to go out as a triggering act, and what we have generally is filing complaints of discrimination.

MS. POLLICK: But to me it's also the handling of the worker's compensation that's at issue.

THE COURT: Well, handling is not distinct from filing. It all flows out of worker's compensation. If the filing is not a protected act under the PHRC, then it stands to reason that the handling of the claim is not. So we will then strike out, when we get to the instructions we'll do this as a triggering act, the worker's compensation filing. We must, because the mere mention, inarticulately pled, does not allow that to be a triggering act, in my view.

So with that removed, then, we have the filing – filing complaints of discrimination, generally described, again, in the three areas by failing to interview her for the jet press position, pointing a video camera at her while she worked for Eureka, and then the handing of involuntary and voluntary layoffs and call backs.

Now, I understand, Mr. Cognetti, what your argument is. But saving that for a moment, are those – Ms.

Pollick has confirmed that those are the areas of retaliation that

215

were pled.

MS. POLLICK: And then fighting the worker's compensation I think is the discriminatory act based on her charges of discrimination, and then also fighting her on the –

THE COURT: No.

MS. POLLICK: -- unemployment compensation.

THE COURT: Unemployment compensation is decidedly not under the PHRA.

MS. POLLICK: I'm not saying that, Your Honor, I'm saying that –

THE COURT: Yes, you are. Independently you have a state cause of action for retaliation outside of the PHRA. My belief is on those, you didn't plead that.

MS. POLLICK: Okay.

THE COURT: And in fact you didn't even mention the unemployment compensation. You raised as retaliation that she did not get voluntary layoff – layoffs, and you raised that she – that she was involuntarily laid off when others weren't, as retaliatory acts. The unemployment compensation was not plead, nor can it constitute a basis under the Pennsylvania Human Relations Act.

MS. POLLICK: Okay, Your Honor, what I was saying, and I was just saying that, number one, the worker's compensation, that's a separate and distinct state claim.

216

You're saying I didn't plead it, I understand that, I'm just making sure I understand everything.

I'm saying that in retaliation for filing complaints of discrimination, the defendants fought her unemployment compensation. I'm not saying that's a separate and distinct action, and then fought her –

THE COURT: Well, then it has to be –

MS. POLLICK: -- worker's compensation in retaliation for her filing charges of discrimination.

THE COURT: Maybe you don't understand what I just said. In order for those to be acts of retaliation under your – under what's left of your claim, which is under the PHRA, they have to be recognized under the PHRA. You can't have a triggering act not be cognizable under the PHRA, which would be filing of a Worker's Compensation Act or an unemployment compensation claim, and then have the retaliatory act for filing that recognized under the same Act. Don't you see that?

MS. POLLICK: No.

THE COURT: Okay. Well, that's unfortunate, but they're out. Now –

MR. COGNETTI: Your Honor, the other issue that she raised, and I don't know, something about the reprimand.

MS. POLLICK: Discipline.

MR. COGNETTI: I don't know how that is –

THE COURT: That was -- if – I don't want to put too fine a point on this because we're going to be here forever, but what I'm intending to do is to charge that she was retaliated against for filing complaints of discrimination, I'll reiterate, failing to interview her for the jet press position, pointing a video camera at her when she worked for Eureka, the handling of involuntary and voluntary layoffs and call backs. To the extent that she can fit what's left of her case within any of those areas , I'm going to permit the plaintiff to do that.

MR. COGNETTI: Fine.

THE COURT: I don't know how else to state it.

MS. POLLICK: So you're not going to say and received discipline?

THE COURT: No, no, because all that the testimony showed, as far as I can tell, is that on an occasion she had a written warning which didn't rise to the level of any misconduct, and didn't have any adverse employment consequences. So as a matter of fact and law, that would not constitute some adverse employment consequence. And I don't find that it's cognizable for the purpose of retaliation.

MS. POLLICK: All I was saying was that it's a threat, she was threatened with discharge based on that

warning. And collectively you can look for an adverse action as to the overall treatment. I know that you don't believe that, so I'm just putting it on the record for that.

THE COURT: All right.

MR. COGNETTI: Your Honor, then just very succinctly, our objections to those issues constituting acts of retaliation, there's no evidence in this case that anyone was interviewed for that job or anybody had to be interviewed for that job.

THE COURT: I understand your point.

MR. COGNETTI: And the intent and pretext, Your Honor, we believe we've raised affirmative defenses.

THE COURT: I understand your point, so that we can move on. I have carefully considered this. I agree this is inarticulately pled. This is entirely problematic for me to try to analyze. I think that to err on the side of caution, I'm going to let the claim as stated go to the jury, notwithstanding your renewal of your Rule 50 motion. It is convoluted at best. It is not a strong claim by any means. There may be factual questions. I simply am not in a position to rule at this point that a reasonable jury couldn't in some way find this, although it's hard for me to believe that they would, based on what I see of the case. But I think it would be improvident for me to dismiss the retaliation claim. I'm

221

However, let me say that it is fair argument in my view, and is always fair argument to the jury for defendants' counsel to raise with the jury, for example, that certain claims were placed before the jury in the beginning of the case, and that those claims – some of those claims have been dismissed, and the jury will not hear anything further about those claims.

I will not prohibit you from making that argument, and that's fair game.

MR. COGNETTI: Would you also – would you also tell the jury, just because you've held in these claims, you as a Judge are not – you're not adding any credence to the validity of those claims by your – by your –

THE COURT: Well, no, I generally instruct juries that nothing I may say or do is intended to influence their determinations. I'm not willing to go that far.

MR. COGNETTI: Is that fair argument for me to make a statement along those lines?

THE COURT: As stated, yes, but not – not beyond that point.

MR. COGNETTI: Yes, yes, I understand.

THE COURT: But it is always fair, in my opinion, for the defense counsel under these circumstances, being in a civil or criminal case when cases have been dismissed by the Court, to fairly refer to claims that have been raised by a

222

plaintiff and dismissed, not to get into the legal basis of the dismissal, but simply that the claims have been dismissed for reasons that are not to be a concern, but that they will not have to decide those claims because they have been disposed of and will not go to the jury.

MS. POLLICK: I want to just – can I just, please?

THE COURT: Let me finish.

MS. POLLICK: Before you move on?

THE COURT: No, let me finish.

Again, then, as to what you stated, as to prejudice. Furthermore, if in fact in the face of my repeated rulings in this case, if in the remaining time of this case plaintiff's counsel argues in an area that I have ruled on and if that argument is so prejudicial in my view on your objection that it taints the jury, I will consider at that point directing a verdict in favor of the defendants if in fact any prejudice is shown.

I do not believe up to this point that sufficient prejudice is shown that the jury can't fairly and responsibly act based on the facts and the evidence and the instructions that I will give to the jury.

All right, now your response.

MS. POLLICK: Thank you, Your Honor. I just want to note for my record that I object to the ruling that they're allowed to say what claims have been thrown out. I

Charge that was submitted to the Court that defines what an adverse –

THE COURT: Well, let me go to my charge and in the context of my charge.

MR. COGNETTI: Your Honor, I didn't mean to interrupt you.

THE COURT: Let me – I can't listen to you and read at the same time.

All right, the law appears to be that to prove an adverse employment action plaintiff must establish that she suffered a significant change in employment stats such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Is that the heart of your argument?

MR. COGNETTI: Yes, it is, Your Honor.

THE COURT: Ms. Pollick, what do you say on that point?

MS. POLLICK: I think if you're directly under surveillance, I think that is a change in terms and condition of employment. And I think that, as I said, collectively there is a case law that you look at the collective things that happened to someone and whether that would be an adverse action.

MR. COGNETTI: It's not a change, Your Honor, it

it applies to this case.

MR. COGNETTI: All right, thank you. That's fine, Your Honor.

THE COURT: Now, let's go to paragraph 16 – I'm sorry, page 16, excuse me. Look at page 16 and 17. They are intended to be a precursor to retaliation generally and I will tell you that based on my ruling on line four, the phrase "and a worker's compensation claim" will be stricken, and then "ways" will be deleted. So it will be – it will stand as "for filing complaints of discrimination."

And look at 16 and 17, and I'll hear you on that after you're finished.

(Pause.)

THE COURT: Any objections to 16 or 17?

MS. POLLICK: Your Honor, I'm just going to state that – my previous objections that I could incorporate more acts as retaliation, but I know your ruling, I'm just stating it for the record that I reiterate those objections.

THE COURT: All right.

MS. POLLICK: And then as I had during our pretrial conference, I think that the defendants are liable for their own acts, and you are requiring me to establish Eureka first before I can go to the individual defendants, and I don't think I need to do that. But I know you stance on it. I'm just placing it for the record.

MR. POLISHAN: It's aiding and abetting Eureka, not aiding and abetting the defendants themselves, so I think the charge is correct.

THE COURT: Yeah, I'll stand by the prior ruling. I don't know how you can aid and abet no one, so the ruling stands.

All right, retaliation then is pages 18, 19, 20, and 21. So 18 through 21, I want you to take a look at that with the understanding that under line three, "and a worker's compensation claim" will be lined out and will not be presented to the jury. And reserving the argument as to the video camera as noted. We're going to make a decision on that, but not at this point.

On page 19, I'll note as you're looking at this, where it has on the one, two, three, four, five, fifth line, starting there "as well as her filing a worker's compensation claim," extending to the next line, that will also be deleted.

I'm going to make a further change on page 21, the paragraph starting "the defendants are liable," it would be "defendants can be found" because to do otherwise is to direct a verdict, and I didn't pick that up. The defendants can be found liable under the PHRA for aiding and abetting

Expresses that you claim that she was not given an involuntary layoff when she – that she was not given a voluntary when she wanted it. She was involuntarily laid off, and that she was not called back when she should have been. No, I'm trying to keep this as reasonably simple for the jury, and that certainly frees you to argue any of those areas.

MS. POLLICK: I would again repeat my argument about having to prove Eureka first before I can just have my claim against the defendants.

THE COURT: We're past that.

MS. POLLICK: I am just putting it for the record, Your Honor.

And then which would incorporate the pretext that you're stating I have to prove against Eureka on page 20.

THE COURT: Well, you only – you only have to go to pretext if there is a legitimate nondiscriminatory reason that has been put forward by the defendants which they have endeavored to do in this particular case. But the McDonald Douglas framework would go to any claim against the employer, so that stands consistent with my ruling.

MS. POLLICK: And I would believe that motivating factor would be something that should be in addition.

THE COURT: I don't understand, I don't understand.

MS. POLLICK: Because you have motivating factor is

246

Then so that is the precursor question. I understand Ms. Pollick's objection, which is that the case doesn't have to be proven against Eureka, that objection is noted again as it relates to one.

Two then, and three, simply relate to each of the individual defendants on the aiding and abetting, and then four and five are only reached in the event that there is a determination of liability as against either or both of the defendants.

MS. POLLICK: Your Honor, I didn't denote that you put a nominal damages instruction.

THE COURT: No I didn't.

MS. POLLICK: I request that there –

THE COURT: Why are you entitled to a nominal damage instruction?

MS. POLLICK: Because they can find a violation that doesn't necessarily mean that it's – they could find that she didn't suffer any damage as a result in the sense of monetary.

MR. POLISHAN: I think it's part of the retaliation that's tied right up with the adverse employment action, whether if there is any true loss or not, and I think it would be confusing and misleading to the jury to put a nominal instruction in a case like this.

THE COURT: Mr. Cognetti.

249

fact that she gave that to her employer? It was – they were published, so I don't see why I couldn't state that.

THE COURT: Well, it seems to me that you can because it shows knowledge on the part of the employer – if you argue – let me back up.

My recollection in the context of this case is that she handed it to her employer, either Mr. Tully or Mr. Hendrickson or both, probably Mr. Tully – I can't remember, might have been Mr. Hendrickson – at the time that she was attempting to get paid maternity leave. Now, if you raise it in that context that's objectionable.

It's a matter of fact that she filed a – an action with the Pennsylvania Human Relations Commission and with the EEOC, and that she filed a federal lawsuit, so what – what is it – what would be the reason for you to refer to it at this point? The employer admits that it knew – well the employer is not a party.

The defendants admit that the employer knew through them that she had made those filings.

MS. POLLICK: But I would be saying that they had specific knowledge that she was expressing rights under the Pregnancy Discrimination Act, and that's a protected right.

THE COURT: You then would violate my ruling because I've said any number of times and ways that her claim under the Pregnancy Discrimination Act is gone, and if you refer to the Pregnancy Discrimination Act in your closing you're going to run afoul of my ruling. Why don't you understand that? That claim is gone.

MS. POLLICK: I'm not saying it as – she as had to engage in a protected activity in order to have a retaliation claim –

THE COURT: The protected activity is filing with the EEOC, the PHRC and the federal lawsuit, which claim encompass far more that just pregnancy discrimination. Certainly that is part of it, but I've thrown that out. So the triggering event – the triggering event are those filings. To the extent those filings contain other areas of discrimination, if you relate back to Pregnancy Discrimination Act you're going to cause a whole word of trouble for yourself in this claim. That is out. That is not cognizable. That is not any basis for a claim. That can't be used as part of the retaliation claim, nor can it be used as a standalone claim.

MS. POLLICK: Okay, so I'm not allowed to mention plaintiff's exhibit 6.

THE COURT: I didn't say that, but then you went on to question pregnancy discrimination. I asked you the question why you'd show it, and you started to answer pregnancy discrimination. If your intent in using exhibit 6, and you seem to say this, has to do with something

related to pregnancy discriminate, no, you can't use it.

There are exhibits that were admitted during the – your case in chief that relate to a claim that is now dismissed. If your use of those exhibits runs afoul of my order as it relates to barring argument on the Pregnancy Discrimination Act claim that has been dismissed or using the Pregnancy Discrimination Act as a – as a part of a retaliation claim, then you're going to run into trouble.

MS. POLLICK: How about the fact that they have notice that the EEOC is the administrative body that deals with this type of –

THE COURT: That's not at issue here. It's admitted that she filed with the EEOC. That is not an issue in the case. It's conceded that she made that filing. It's conceded. It doesn't – it doesn't show anything. And – if – I don't think there's any issue of scienter on the part of the two defendants. They concede that they knew that she made the filings. They may have – they may have said that they weren't sure exactly what was in the filings at different times, so if you want to show – if you want to introduce it for that purpose. But I think my recollection is they said they didn't read it in any event and that they passed it upstairs. So I don't think it can show anything.

I think in the context of your case you attempted to introduce it for the purpose of her testimony that she

gave it to, in the first instance, Mr. Hendrickson, to explain to him that she had rights under the Pregnancy Discrimination Act and that she should be given paid maternity leave. I can think of no other purpose that you would introduce it for, and I don't think therefore you can use it in any way during your closing.

So answer is, I don't see how, but I'm troubled, to say the least, by the fact that you just reasserted the Pregnancy Discrimination Act, and I really just am at a loss to try to explain again to you that you can't use that. And I'm telling you, and I'm going to put this on the record that if you do, the sanction depending on how you do it, but if you do it just as you did it on the defendant's request may be a directed verdict in favor the – of both defendants because it may so poison the jury that I may have to impose that remedy. And I'm not going to impose a remedy of a mistrial. We're not going to retry this case.

You're in jeopardy of losing this case in a finger snap for your client if you blow through my ruling.

Anything else? All right, we'll see you tomorrow morning at 8:30.

MR. COGNETTI: Thank you, Your Honor.

(4:30 p.m., court adjourned.)

3

(8:35 a.m., convene; jury not present.)

THE COURT: Good morning to counsel and the clients. We are on the record prior to summoning the jury for closing arguments. When we adjourned yesterday at the conclusion of the charge conference, we had an issue which was unresolved and which was unresolved and which I indicated that I would take a considered look at based on the arguments by counsel.

The plaintiff has submitted a document, what has been numbered document 238, which is a written short brief in support of an instruction on adverse actions. And the issue succinctly described was whether or not the pointing – or the allegation that the video camera was pointed at plaintiff constituted an action sufficient to be included in the jury instructions and in the verdict slip together with the handling of involuntary layoffs, voluntary layoffs and call backs, and failing to interview the plaintiff for the jet press position, and whether it was in fact an adverse employment action.

It is clear to me that having now reviewed the cases, that it does not belong in that panoply, and it does not constitute an adverse employment action in the context of this case.

Now, there is a further question and – that arises, and the further question appears to be this. The plaintiff has adduced facts which, among other things –

5

action, and the actions by the defendants as they spoke to her or responded to questions that she had. But it will not be – none of those things will be included in the – as jury – in the jury questions as adverse employment actions, nor will they be cited to in the jury instructions.

MR. COGNETTI: Your Honor, I have a major problem with that last point, that is the conversations with Mr. Tully. You had excluded the discrimination based on the Pregnancy Discrimination Act and the alleged conversations Mr. Tully had with the – on the 11th. That's his only conversation. We had prepared Ruth Nick and Sue Banicky to testify that there was no conversations between my client and the plaintiff to – that indicated any yelling or screaming. We did not pursue that line of questioning because that element of the case had been removed yesterday. Now we're prejudiced –

THE COURT: I should clarify my ruling, and I understand your concern in that regard, and you raise a valid point.

I did exclude, and I meant exclude, and I want to be clear about this, those interjections that the plaintiff had with her supervisors involving pregnancy discrimination. You are quite correct in that, and I want to be clear about that. There were other interactions that were noted but were not related to pregnancy.

51

Details of what analysis you must perform in evaluating the plaintiff's case.

The plaintiff must satisfy the following two requirements to hold either one or both of the two individual defendants, Ronald Tully and Butch Hendrickson, who I will refer to collectively as defendants, liable in this case.

First, the plaintiff must establish that Eureka retaliated against plaintiff in violation of the PHRA. If you do not find that Eureka violated the PHRA by retaliating against plaintiff, then your deliberations must end. If however you do find that Eureka retaliated against the plaintiff in violation of the PHRA, then you must proceed to the second part of the analysis.

The second part of the analysis is that the plaintiff must establish individual liability as against one or both of the defendants pursuant to a concept, and that concept is known as aiding and abetting an unlawful practice under the PHRA. And I'll elaborate on that in just a moment.

Now let me explain in detail that elements plaintiff must prove with respect to the first and second requirements as they relate to her retaliation claim.

Now, as I previously noted, as I just noted, plaintiff has asserted that Eureka violated the PHRA by retaliating against her for filing complaints of discrimination in the following ways: First, in the handling of involuntary layoffs, voluntary layoffs, and call backs and/or, second, by failing to interview her for the jet press position. The defendants deny any retaliatory intent or conduct concerning the plaintiff and contend that all the employment decisions regarding the plaintiff were made without an intention to retaliate and/or that they were in accordance with the governing Collective Bargaining Agreement, which I will also refer to as the CBA.

It is your responsibility to decide whether plaintiff has proven her claim of retaliation by a preponderance of the evidence. Now, in order to find that Eureka violated the PHRA by engaging in discriminatory retaliation, you must find that the plaintiff has proven the following three elements by a preponderance of the evidence. First, that plaintiff engaged in activity protected by the PHRA; second, that Eureka took an adverse employment action against the plaintiff; and third, that there was a casual connection between plaintiff's participation in the protected activity and the adverse employment action.

Now, the first element concerns protected activity or conduct. As it relates to this case, plaintiff's filing charges of discrimination arising out of her allegation that Eureka retaliated against her constitute – constitutes a

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBIN SCOTT	:	
	:	CIVIL ACTION –
Plaintiff	:	LAW
	:	JURY TRIAL
	:	DEMANDED
V.	:	
	:	
RONALD TULLY AND	:	
ROBERT HENDRICKSON	:	
	:	
Defendants	:	NO. 3:02CV805
	:	Date Filed: 5/10/02
		(Judge Jones)

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR FOUR (4) PEREMPTORY STRIKES PER SIDE

This brief is filed in support of Plaintiff's Motion for Four (4) Peremptory Strikes per side.

STATEMENT OF FACTS

Plaintiff, Robin Scott, was employed at Eureka starting in 1993 as a Finisher in the TC department. In August 2000, Scott requested paid pregnancy leave, but Defendants (i.e. Tully and Hendrickson) denied the same. However, Defendants provided paid medical leave to anyone that presents doctor's excuse stating they cannot work due to any illness except pregnancy. Pursuant to the Pregnancy Discrimination Act ("PDA") and PHRA, and employer must treat pregnant women in the same fashion as any other temporarily disabled employee. Clearly, in this case, Defendants have not done that in plain violation of the PDA and PHRA.

Scott was discriminated against and harassed because of her pregnancy. Specifically, Defendant Tully screamed at her because she sought paid medical leave, threw her doctor's excuse in the garbage, would not accept her doctor's excuses, requires her to obtain another doctor's excuse, told her the Pregnancy Act was no longer in effect, screamed at her and stated she got hurt on the job on purpose, tried to force her to sign off on FMLA forms rather than paid leave forms, threatened her job if she did not appear for work even though she had medical note excusing her from work, causing her to go into fetal distress, and allowed co-workers to make offensive comments and conduct toward her.

Thereafter, Scott was retaliated against for complaining of pregnancy discrimination. Instead of allowing Scott to return to work after getting released from the care of Dr. Davis, Defendants laid Scott off. However, according to time sheets, Defendants should have allowed Scott to return. Further, Hendrickson admitted that "she said that everyone is harassing her and that and "I don't know why they are picking on me and why they don't want to work with me." I said, "it's probably because you're the only one that has a lawsuit against the company" (Hendrickson, Tr. at 185). Clearly, Defendants retaliated against Scott for complaining and seeking paid medical leave.

QUESTION PRESENTED

I. Whether it is only fair for this Court to provide each side with four (4) peremptory strikes since Defendants' have continually filed motions jointly and therefore their interests, by their own admission, are not adverse.

Suggested Answer: In the Affirmative.

DISCUSSION OF LAW

Defendants obtain an unfair advantage by being given each three (3) peremptory strikes, a total of six (6), while Plaintiff only receives three (3). *Sheffield v. Lewis*, 246 Ga. 19, 268 SE2d 615 (1980). When there is only one issue to be tried, defendants are not entitled to three (3) additional peremptory strikes. *Id.*

In *Sheffield*, the Court reversed the lower court granting each defendant three (3) peremptory strikes, a total of six (6) for the defendants, which only giving the plaintiff three (3). The Court reasoned:

> [a] different situation arises when multiple parties to a suit receive

> more strikes than their adversary. *The party receiving fewer strikes cannot cure the imbalance and error caused thereby exercising either all of his strikes or none of them. His adversaries will clearly have an advantage.* They will have the power to select a jury presumably balanced in their favor by challenging a greater number of jurors, regardless in their favor by challenging a greater number of jurors, regardless of whether the opposite party uses all of his strikes or not. *Id.*

The Court also cited the Pennsylvania case *Commonwealth v. Vecchiolli* in support of its reversing the lower court's granting of additional peremptory strikes. *Id.* The *Vecchiolli* case involved a husband and wife jointly being indicted and the court deemed that defendants were not entitled to additional peremptory strikes as a single defendant. *Commonwealth v. Vecchiolli*, 224 A2d 96 (Pa. 1967).

Identically, here, it would be unfair and prejudicial to give Defendant's more strikes that Plaintiff. There is no doubt that Defendants "will have the power to select a jury presumably balanced in their favor by challenging a greater number of jurors, regardless of whether the opposite party uses all of his strikes of not". *Sheffield*, 268 SE2d 615. As the *Sheffield* case points out "[p]erhaps it would have been proper to grant defendants additional strikes sufficient to be equally divisible by the number of defendants and at the same time allot the opposite party an equal increase in order to balance the number on each side". *Id.*

CONCLUSION

For all the foregoing reasons, Plaintiff requests that this Court provide both sides with the same amount of peremptory strikes in fairness to both parties.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBIN SCOTT,	:	NO. 3:02CV805
	:	(Judge Jones)
Plaintiff	:	
V.	:	
	:	
RONALD TULLY AND	:	
FOREST HENDRICKSON	:	
	:	
Defendants.	:	
	:	

MEMORANDUM AND ORDER

August 1. 2005

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending before the Court is a Motion for Four Peremptory Strikes Per Side ("the Motion") (doc. 216) filed by Plaintiff Robin Scott ("Plaintiff" or "Scott") on July 18, 2005. For the reasons that follow, we will summarily deny the Motion.

DISCUSSION:

At the pre-trial conference held on July 1, 2005, the Court indicated that Plaintiff would have three peremptory strikes at the trial in this matter and Defendants Ronald Tully and Forest Hendrickson (collectively "Defendants," individually "Tully" and "Hendrickson") would each have three peremptory strikes. (See Rec. Doc. 210 at 2).

In the Motion, Plaintiff asserts that Defendants obtain an unfair advantage be being provided with three peremptory strikes, totaling six, while Plaintiff only receives three (Pl.'s Br. Supp. Mot. at 3). In support of her Motion, Plaintiff cites to a non-precedential Georgia Supreme Court Case, Sheffield v. Lewis, 268 S.E.2d 615 (Ga. 1980), in which the court reversed the lower court's grant of three peremptory strikes to each defendant, while only giving the plaintiff three. The only other case cited by the Plaintiff, Commonwealth v. Vecchiolli, 224 A.2d 96 (Pa. 1967), addressed in the Sheffield opinion, is distinguishable from the case sub judice as it concerned a husband and wife **jointly** indicted for the crime of assault with intent to rob. The Pennsylvania Supreme Court concluded that defendants were not entitled to additional peremptory strikes as a single defendant. In the

Motion, Plaintiff requests that the Court provide each side with four peremptory strikes since the Defendants have continually filed motions jointly and therefore their interests, by their own admission, are not adverse. (Pl.'s Br. Supp. Mot. at 4).

As the Third Circuit Court of Appeals instructed in Fedorchick v. Massey-Ferguson, 577 F.2d 856 (3d Cir. 1978), the number of peremptory challenges allowed in multi-party civil litigation is governed by the second sentence of 28 U.S.C. § 1870, the statute providing for jury challenges, which states:

> Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

28 U.S.C. § 1870 (2005). Therefore, on its face, the statute permits the trial judge to allocate more than three peremptory challenges when more than one plaintiff or defendant is present in a case. Fedorchick, 577 F.2d at 857; Smith v. Pressed Steel Tank Co., 66 F.R.D. 429 (E.D. Pa. 1975), *aff'd*,

524 F.2d 1404 (3d Cir. 1975). Unlike the Vecchiolli case in which a husband and wife were jointly indicted for the crime of assault with intent to rob and were therefore considered one defendant for the purpose or peremptory challenges, Defendants Tully and Hendrickson are individual Defendants who are represented by separate counsel. Tully is represented by Sal Cognetti, Jr. and Hendrickson is represented by Timothy P. Polishan. (See Rec. Docs. 92, 94). Although Defendants may have filed motions or pre-trial submissions jointly, different factual allegations were asserted by Plaintiff against the individual Defendants, which will result in potentially differing defenses, to be put forth by their respective counsel.

We will therefore summarily deny Plaintiff's Motion. Plaintiff will have three peremptory strikes at the time of trial and each Defendant will have three peremptory strikes.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiff's Motion for Four Peremptory Strikes Per Side (doc.216) is summarily denied.

s/ John E. Jones III
John E. Jones III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBIN SCOTT,	:	
	:	
Plaintiff	:	
	:	
v.	:	No.: 02/805
	:	
TULLY, et al.	:	

ARGUMENT IN SUPPORT OF INSTRUCTION ON ADVERSE ACTIONS

An adverse action can include "job security". *Lloyd v. Wyoming Valley Healthcare System, Inc.*, 994 F. Supp., 288 (M.D. Pa. 1998)(Judge Caputo). "Retaliatory conduct constitutes adverse employment action under Title VII only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects her or her employment status as an employment". *Lafate v. Chase*

Manhattan Bank, 123 F. Supp.2d 773 (D. Del. 2000); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (1997).

However, "an adverse employment action is not limited to loss or reduction of pay or monetary benefits but may include other forms of adversity as well...[w]hether Plaintiff has experience an adverse employment action is an issue of fact and often cannot be resolved on a motion for summary judgment, except where the is not fairly contestable" *Fallon v. Ashcroft*, 2002 U.S. Dist. LEXIS 12202 (emphasis added).

The Third Circuit has states that to be adversely affected "does not mean that the employee must be threatened with or experience 'economic' or 'tangible' discrimination." *Robinson*, 120 F.3d at 1297. Also, a supervisor's threats, even if not carried out, establishes an adverse action. *Id.* The Third Circuit has noted that formal reprimands that result in notation in an employee's personnel file may be sufficient to establish an adverse action. *Id.* at 1298.

Moreover, "receiving or being denied a desired promotion is sufficiently serious and tangible to constitute a change in the employee's 'terms, conditions, or privileges' of employment. Id. at 1299; "…. *Collins*, 830 F.2d at 703 (holding adverse action does not require loss of money or benefits but rather may consist of changes in location, duties, perks or other aspects of a job)" *Whitfield v. Pathmark Stores, Inc.*, 1998 U.S. Dist. LEXIS 9750.

Further, as the Third Circuit has instructed "courts should not analyze the employer's individual acts in isolation, but rather should examine the acts collectively in deciding whether there has been adverse employment action". *Shaner v. Synthes* (USA), 123 F.3d 494, 503 n.9 (3d Cir. 2000). For instance, in *Kim v. Nash Finch Co.*, 123, F.3d 1046, 1060 (8th Cir. 1997), the court held that "[a]s a matter of law, [the defendant] conduct, which included reduction in duties, disciplinary action and negative personnel reports, as well as required remedial training, constituted adverse employment action". Moreover, "…when the plaintiff is subject to a continuous pattern of harassment following the protected activity" it can support a charge of retaliation. *Sarullo v. United States Postal Serv.*, 352 F.3d 789 (3d Cir. 2003) (citing *Woodson*, 109 F.3d at 920; *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993)).

Consequently, Plaintiff requests that this Court allow her to use the angling of the camera as a change in the terms, conditions and privileges of employment. Prior to her complaining, Plaintiff never was under direct scrutiny of the video surveillance. Also, Plaintiff requests that the discipline and continued harassment be additional adverse actions.

Respectfully Submitted,
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